INTERPOSITION

Editorials

and

Editorial Page Presentations

The Richmond News Leader

1955-1956

Section 15.—*That no free government, or the blessings of liberty can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.*

—Constitution of Virginia.

The Transcendent Issue

In commenting upon the report of the Gray Commission a week ago, this newspaper extended its support generally to the commission's program, but we directed our comments first to what the report termed the "transcendent" issue.

This was the grave action taken by the Supreme Court, when, irrespective of precedent, long acquiesced in, it asserted the right to change its interpretation of the Constitution at its pleasure, disregarding the orderly processes for its amendment set out in Article V thereof.

"It means," said the commission, "that the most fundamental of the rights of the States and of their citizens exist by the court's sufferance, and that the law of the land is whatever the court may determine it to be by the process of judicial legislation."

Can it be right, we have inquired, that binding "law of the land" can be fashioned in this cavalier way? Was it ever intended by the founding fathers that such authority should be vested in the court? If the commission correctly states the degeneracy of constitutional process, does not Virginia have a right and a duty to interpose its sovereignty in a valiant effort to halt the evil?

An examination of these profound questions of constitutional rights and powers has prompted us, even as the Constitution of Virginia suggests, to recur to fundamental principles for guidance. Over the next several days, we propose to offer on the editorial page certain historic documents that shed light upon evils of today that were prophetically seen long ago. The first of these documents appear at right. [page 3].

Kentucky-Virginia Resolutions

In the Summer of 1798, the Fifth Congress enacted three laws that came to be known as the "Alien and Sedition Acts."

The first of these made it lawful for the President at any time to order the deportation of "all such aliens as he shall judge dangerous to the peace and safety of the United States." The second provided that in wartime, or whenever an invasion might be threatened, all aliens over the age of 14 "shall be liable to be apprehended, restrained, secured and removed, as alien enemies."

It was the third act that created the greatest controversy. Here the Congress made it a crime, punishable by a fine up to $2,000 or a prison term of up to two years, for any person "to write, print, utter or publish . . . any false, scandalous and malicious writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them or either of them, into contempt or disrepute."

These enactments stirred Jefferson, and many other leading Republicans of the day, to furious opposition. Feeling ran especially high in Virginia, where freedom of speech and of the press had vital meaning.

Spurred by the many expressions of discontent, a delegation from the Kentucky General Assembly came to Jefferson and asked him to draft a resolution that might be adopted. Jefferson (he was then Vice-President) consented, though he insisted that his authorship be kept a secret. He then prepared the resolution, excerpts from which appear at right, which was approved unanimously by the Kentucky Assembly.

A month later, after conversations with Madison, then a member of the House of Delegates, the General Assembly of Virginia took action. On December 21 it adopted the Virginia Resolution he submitted for consideration. This also appears, in full text, at right.

Nothing in today's paper, we would suggest to our readers, merits their thoughtful attention more than these resolutions of 157 years ago. How the

Legislatures of Kentucky and Virginia directed their attention to manifestly unconstitutional laws enacted by Congress. If the Sedition Act were to remain on the books, all freedom of speech would vanish. Yet the States, only eight years earlier, had nailed into the Constitution a positive prohibition against Federal laws abridging freedom of speech.

Faced with a "deliberate, palpable and dangerous exercise" by the Federal government of powers not granted to it, Jefferson, and Madison brought forward the solemn right of "interposition." In the Second Kentucky Resolution, Jefferson asserted "the unquestionable right" of a sovereign State, in such an emergency, to judge of the infraction of the Constitution; he declared "that a nullification, by these sovereignties of all unauthorized acts done under color of that instrument," is the rightful remedy.

This doctrine on their part never was pursued to a final test. The Sedition Act, under its own terms, was to expire in 1801. It shortly became evident that a political revolution was in progress that would sweep Jefferson into the presidency and oust the Adams administration. There was no realistic possibility, once the law expired, that it would be re-enacted.

Yet we may well ask ourselves in 1955, confronting a manifestly unconstitutional action *not by the Congress but by the Supreme Court,* whether the principles enunciated so forcefully by Jefferson and Madison may not have great validity today. We may reflect that over a period of 86 years, from ratification of the Fourteenth Amendment in 1868 to the court's opinion of 1954, it was repeatedly held that the power to operate separate but equal schools had not been prohibited to the States by the Constitution. This was the solemnly confirmed understanding by which the States established and maintained one of their most important institutions.

Now, suddenly, it is asserted by the court that this power *is* among the powers "prohibited [by the Constitution] to the States." Is not so drastic an amendment of a clearly understood constitutional provision a "deliberate, palpable and dangerous" exercise by the court of authority not granted it?

We would invite our readers to examine these questions with deepest care as we "recur to fundamental principles" for guidance today.

The Virginia Resolution of 1798, drafted by James Madison, and the Kentucky Resolution of the same year, drafted by Jefferson, are key documents in any understanding of interposition. In the 50 years that followed their adoption, the resolutions were to be cited repeatedly—in Ohio in 1820, in New Hampshire in 1844, in Massachusetts in 1858—as the "Doctrine of '98." Students of the subject should note, however, that Madison altered his position somewhat in later years.

Kentucky, Virginia Asserted Sovereignty In These Famed Resolves of 1798-99

VIRGINIA, to wit,

In the House of Delegates,

Friday, December 21st, 1798.

RESOLVED, that the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the Constitution of this State, against every aggression, either foreign or domestic, and that they will support the government by the United States in all measures, warranted by the former.

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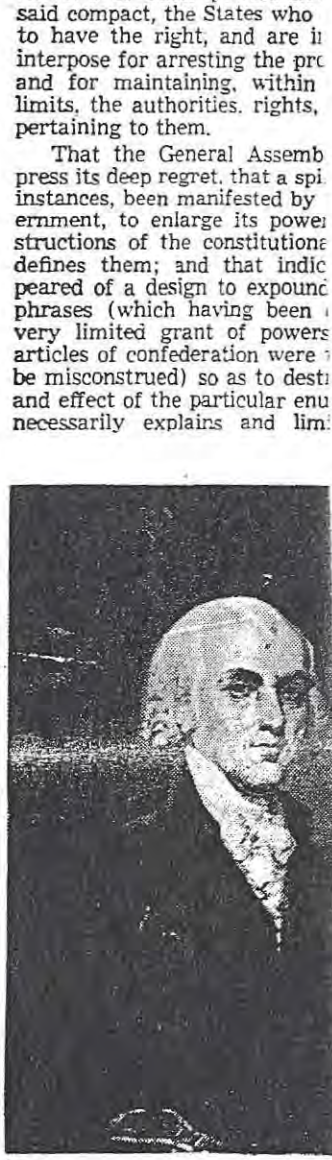

JAMES MADISON

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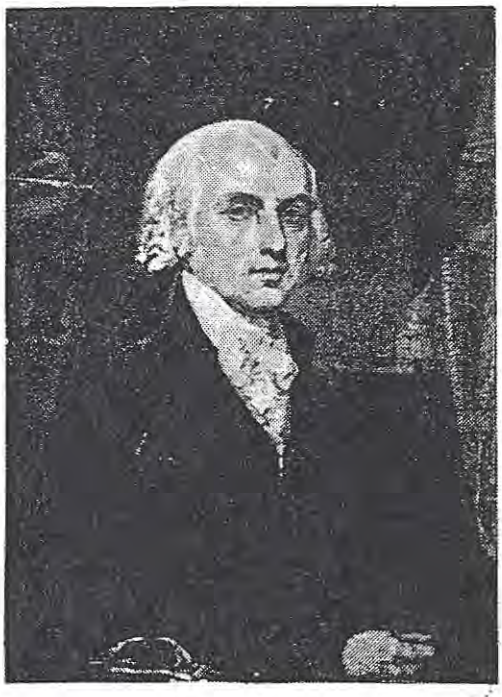
That this Assembly most solemnly declares a warm attachment to the Union of the States, to maintain which, it pledges its powers; and that for this end, it is their duty, to watch over and oppose every infraction of those principles, which constitute the only basis of that Union, because a faithful observance of them can alone secure its existence, and the public happiness.

That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorized by the grants enumerated in that compact, and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the States who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.

That the General Assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the Federal Government, to enlarge its power by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which having been copied from the very limited grant of powers in the former articles of confederation were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general



JAMES MADISON

phrases; and so as to consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable consequence of which would be, to transform the present republican system of the United States, into an absolute, or at best a mixed monarchy.

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the "Alien and Sedition Acts," passed at the last session of Congress; the first of which exercises a power nowhere delegated to the Federal government, and which by uniting legislative and judicial powers, to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution: and the other of which acts, exercises in like manner a power not delegated by the Constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto; a power which more than any other ought to produce universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

That this State, having, by its convention which ratified the Federal Constitution, expressly declared, "that among other essential rights, the liberty of conscience and the press cannot be canceled, abridged, restrained or modified, by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry and ambition, having with other States recommended an amendment for that purpose, which amendment was in due time annexed to the Constitution, it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shewn to the most palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.

That the good people of this Commonwealth, having ever felt and continuing to feel the most sincere affection for their brethren of the other States, the truest anxiety for establishing and perpetuating the union of all, and the most scrupulous fidelity to that Constitution which is the pledge of mutual friendship, and the instrument of mutual happiness: the General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken by each for co-operating with this State, in maintaining unimpaired the authorities, rights, and liberties, reserved to the States respectively, or to the people.

That the Governor be desired to transmit a copy of the foregoing resolutions to the executive authority of each of the other States, with a request, that the same may be communicated to the Legislature thereof.

And that a copy be furnished to each of the Senators and Representatives representing this State in the Congress of the United States.

The First Kentucky Resolution

November 16, 1798

I. *Resolved*, that the several States composing the United States of America are not united on the principle of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each State to itself, the residuary mass of right to their own self-Government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force:

That to this compact each State acceded as a State, and is an integral party, its co-States forming as to itself, the other party:

That the Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress . . .

[Editor's Note: Resolutions II through VIII, omitted here, were directed toward specific terms of the Alien and Sedition Acts.]

IX. *Resolved*, lastly, that the Governor of this Commonwealth be, and is hereby authorized and requested, to communicate the preceding Resolutions to the Legislatures of the several States, to assure them that this Commonwealth considers Union for specified National purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness, and prosperity of all the States: that faithful to that compact, according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation; that it does also believe, that to take from the States all the powers of self-Government, and transfer them to a general and consolidated Government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness, or prosperity of these States:

And that therefore, this Commonwealth is determined, as it doubts not its co-States are, *to submit to undelegated and consequently unlimited powers in no man or body of men on earth:*

That if the acts before specified should stand, these conclusions would flow from them: that the General Government may place any act they think proper on the list of crimes and punish it themselves, whether enumerated or not enumerated by the Constitution as cognizable by them; that they may transfer its cognizance to the President or any other person, who may himself be the accuser, counsel, judge, and jury, whose *suspicions* may be the evidence, his order the sentence, his officer the executioner, and his breast the sole record of the transaction: that a very numerous and valuable description of the inhabitants of these States, being by this precedent reduced as outlaws, to the absolute dominion of one man, and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the powers of a majority of Congress, to protect from a like exportation or other grievous punishment the minority of the same body, the Legislature, Judges, Governors, and Counselors of the States, nor their other peaceable inhabitants who may venture to reclaim the constitutional rights and liberties of the State and people, or who for other causes, good or bad, may be obnoxious to the views or marked by the suspicions of the President, or be thought dangerous to his or their elections or other interests, public or personal:

That the friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow, or rather has already followed; for already has a Sedition Act marked him as its prey:

That these and successive acts of the same character, unless arrested on the threshold, may tend to drive these States into revolution and blood, and will furnish new calumnies against Republican Governments, and new pretexts for those who wish to be believed, that man cannot be governed but by a rod of iron:

That it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism: free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited Constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go; and let the honest advocate of confidence read the Alien and Sedition Acts, and say if the Constitution has not been wise in fixing the limits to the government it created, and whether we should be wise in destroying those limits?

Let him say what the government is if it be not a tyranny, which the men of our choice have conferred on the President, and the President of our choice has assented to and accepted over the friendly strangers, to whom the mild spirit of our country and its laws had pledged hospitality and protection: that the men of our choice have more respected the bare suspicions of the President than the solid rights of innocence, the claims of justification, the sacred force of truth, and the forms and substance of law and justice.

In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.

That this Commonwealth does therefore call on its co-States for an expression of their sentiments on the acts concerning Aliens, and for the punishment of certain crimes hereinbefore specified, plainly declaring whether these acts are, or are not authorized by the Federal Compact?

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And it doubts not that their sense will be so announced as to prove their attachment unaltered to limited Government, whether general or particular, and that the rights and liberties of their co-States will be exposed to no dangers by remaining embarked on a common bottom with their own:

That they will concur with this Commonwealth in considering the said acts as so palpably against the Constitution as to amount to an undisguised declaration, that the Compact is not meant to be the measure of the powers of the General Government, but that it will proceed in the exercise over these States of all powers whatsoever:

That they will view this as seizing the rights of the States and consolidating them in the hands of the General Government with a power assumed to bind the States (not merely in cases made Federal) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent:

That this would be to surrender the form of Government we have chosen, and live under one deriving its powers from its own will, and not from our authority; and that the co-States, recurring to their natural right, in cases not made Federal, will concur in declaring these acts void and of no force, and will each unite with this Commonwealth in requesting their repeal at the next session of Congress.

The Second Kentucky Resolution

November 14, 1799

(Following the adoption of its first resolution in November, 1798, the Kentucky General Assembly received some sharp replies from the legislatures of Northern States dominated by the Federalist party. In November, 1799, the Kentucky Assembly, unwilling to let these replies constitute the last word, adopted this second resolution):

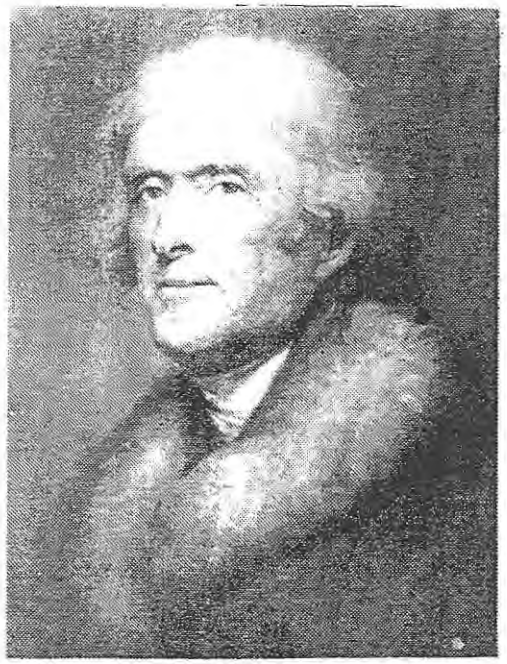
RESOLVED, That this Commonwealth considers the Federal Union upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several States: that it does now unequivocally declare its attachment to the Union, and to that compact, agreeably to its obvious and real intention, and will be among the last to seek its dissolution:

That, if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the State governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence:

That the principle and construction, contended for by sundry of the State legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop not short of *despotism*—since the discretion of those who administer the government, and not the *Constitution*, would be the measure of their powers:

That the several States who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction; and, *that a nullification, by those sovereignties of all unauthorized acts done under color of that instrument, is the rightful remedy:*

That this Commonwealth does, under the most deliberate reconsideration, declare, that the said Alien and Sedition Laws are, in their opinion, palpable violations of the said Constitution; and, however cheerfully it may be disposed to surrender its opinion to a majority of its sister States, in matters of ordinary or doubtful policy, yet, in momentous regulations like the present, which so vitally wound the best rights of the citizens, it would consider a silent acquiescence as highly criminal:



THOMAS JEFFERSON

That, although this Commonwealth, as a party to the Federal compact, *will bow to the laws of the Union*, yet it does, at the same time, declare, that it will not now, or ever hereafter, cease to oppose, in a constitutional manner, every attempt, at what quarter so ever offered, to violate that compact:

And finally, in order that no pretext or arguments may be drawn from a supposed acquiescence, on the part of this Commonwealth, in the constitutionality of those laws, and be thereby used as precedents for similar future violations of the Federal compact, this Commonwealth does now enter against them, its solemn PROTEST.

November 22, 1955

The Right of Interposition

From the very day of the Supreme Court's opinion in the school segregation cases, the South, in searching for a wise course of action, has been handicapped by a fault that in ordinary times is among our highest virtues: It is our reverence for law, and our obedience to constituted authority.

Thus, when the Supreme Court handed down its decision, there was everywhere an agonizing, but automatic acceptance of the court's authority. The decision was wrong, we said; it was directly contrary to a long line of accepted judicial interpretations; it was violative of the Fourteenth Amendment as the amendment had been universally understood for more than 80 years. Yet the Supreme Court had declared that the right to operate racially separate schools was, as of May 17, 1954, a right now "prohibited to the States." And a people too long accustomed to submissiveness agreed that the court, indeed, was "supreme."

The Gray Commission, in a single great and simple paragraph, has explained to us what this agreement implies. "It means," said the commission, "that the most fundamental of the rights of the States and of their citizens exist by the court's sufferance." It means further, "that the law of the land is whatever the court may determine it to be by the process of judicial legislation."

This is the third time in 10 days that we have quoted these few lines from the report of the Gray Commission. They go to the very heart of the gravest issue to confront not merely Virginia and the South, but rather the entire nation, in nearly a century.

This is, as the Gray Commission said, *the transcendent issue.* Measured against its solemn implications, problems of local school segregation, serious as they are, seem almost petty.

What we must ask ourselves as Virginians, as heirs to the philosophical inheritance of Jefferson and Madison, is whether any means exist by which this "process of judicial legislation" may be brought to a pause. If the "most fundamental of the rights of the States and of their citizens" are not to be swept away by judicial encroachment, and the States reduced to the status of mere counties, must we not exert every possible effort to halt the courts in their usurpation of our sovereign powers?

Surely, it would appear, such an effort is imperative; and perhaps Governor Stanley and his Gray Commission, even at this desperately late hour, could explore fundamental principles as enunciated by Jefferson and Madison. Virginians of today may yet inquire if these great men, long ago, did not foresee the constitutional crisis before us in 1955 and point a way toward its peaceful solution.

The commission would find, we believe, that Jefferson and Madison did prophesy a time when the Federal government might usurp powers not granted it. And in such an emergency, these great men asserted, the States may declare their inherent right—inherent in the nature of our Union—to judge for themselves not merely of the infractions, but "of the mode and measure of redress."

This is the *right of interposition.*

What Is This Right?

If the Gray Commission, which includes some of the finest minds in Virginia, undertakes to explore this transcendent problem, it will wish first to inquire into the nature of the right of interposition. Does it exist? What are the conditions that must arise before so solemn and drastic a remedy may be proposed? Under what circumstances has it been asserted in the past? Do such circumstances obtain today?

Careful reasoning, we believe, would lead the Gray Commission to conclude that the right does indeed exist. Ours is a Union formed of sovereign States who voluntarily have surrendered certain of their powers to a central government, and voluntarily have prohibited the exercise of certain powers to themselves. By solemn compact, they have agreed that the rights not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States *respectively,* or to the people. Thus each of the respective States stands coequal in the compact with every other

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must ask ourselves as Vir- eirs to the philosophical in- Jefferson and Madison, is means exist by which this udicial legislation" may be pause. If the "most funda- rights of the States and of " are not to be swept away ıcroachment, and the States ıe status of mere counties, exert every possible effort ›urts in their usurpation of powers?

ould appear, such an effort ; and perhaps Governor is Gray Commission, even at ly late hour, could explore principles as enunciated by Madison. Virginians of t inquire if these great men, not foresee the constitu- efore us in 1955 and point a s peaceful solution.

sion would find, we believe, and Madison did prophesy the Federal government ›owers not granted it. And ıergency, these great men States may declare their —inherent in the nature —to judge for themselves the infractions, but "of the sure of redress."

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does indeed exist. Ours is d of sovereign States who ve surrendered certain of to a central government, have prohibited the exer- powers to themselves. By ct, they have agreed that delegated to the United Constitution, nor prohibited States, are reserved to the *›ely,* or to the people. Thus spective States stands co- ompact with every other

States; theirs is a joint venture, an agreement among principals; it was only by the consent of the individual States that the Union came into being at all.

If one of the *principals* has no right to assert an infraction of this agreement, who then has the right? If the central government created by the States should usurp powers that might destroy the States, can it be contended that the principals have no right of protest, no right of appeal to their co-equals, to resolve an issue of contested powers? Is it reasonable to believe that the States, like Frankenstein, have created an agency superior to themselves, and that they are utterly powerless to contest their own destruction?

The briefest statement of the hypothesis suggests its absurdity. The right of interposition, as Jefferson and Madison termed it, exists because it has to exist. Without such a right, the Constitution is a hollow shell; and the "perfect Union" it was intended to insure is disclosed as no Union at all, no joining of respective parts, but rather a single mass, monolithic, a creature more powerful than its creator.

If the existence of the right of interposition be admitted (and this is to admit no more than a right of survival, a right of compact), the Gray Commission might next inquire into the nature of the right. What are the conditions precedent to asserting the right of interposition? In what way may the people of a State interpose the shield of State sovereignty between the Federal government and the object of the Federal government's encroachments?

'Deliberate . . . Palpable . . . Dangerous'

The right of interposition, as Jefferson and Madison saw it, is a right of last resort. Ordinarily, the Congress could be expected to take no action so grossly violative of the compact among the States that satisfactory redress could not be found in the forms of the Constitution—by judicial relief, by executive veto, by the election of a new Congress. And ordinarily the executive would assert no drastic powers that could not be curbed by well-established procedures. The greatest danger lay in the possibility of judicial usurpation, but here, it was thought, some confidence would have to be reposed in the restraint and moderation of men or our highest bench. The Federal government, it was anticipated, would recognize its limited authority and operate therein; the States, for their part, would recognize the surrender of certain of their powers, and would restrict their activities to the fields reserved for them.

"In cases of little urgency or importance," said Jefferson, "the prudence of both parties will keep them aloof from the questionable ground."

What, then, are the characteristics by which we may recognize the "great and extraordinary cases," as Jefferson termed them, in which the right of interposition may be asserted? Madison explored this very question in his thoughtful report to the General Assembly in 1799, an excerpt from which appears on (page 8).

A State, he said, must be confronted with a usurpation of power that "deeply and essentially" affects its vital principles. The right is not to be exercised "either in a hasty manner or on doubtful or inferior occasions." The conditions expressly required for such an interposition are that the offense must constitute "a deliberate, palpable, and dangerous breach of the Constitution by the exercise of powers not granted by it."

His exposition of this requirement merits our most careful study. *Deliberate . . . palpable . . . dangerous:* These are the characteristics that must be present.

Has such a breach of the compact occurred in the Supreme Court's mandates under its school decision? Does the court's opinion "deeply and essentially" affect vital principles of our political system? Is this a "great and extraordinary case," and not a "doubtful or inferior occasion"?

These questions we most respectfully commend to the Gray Commission as the group best qualified, by reason of its enunciation of the transcendent issue, to explore them.

If the commission should conclude that such a grave breach of the constitutional compact has been committed; that an issue of contested powers has developed, so serious that it can be put to rest only by constitutional amendment, the commission may wish to consider recommendations to the Governor—late as the hour may be—by which Virginia would appeal to her sister States as the final umpire in a controversy of towering importance to the people of the South.

Mr. Madison's Report of 1799

(In 1798, the Virginia General Assembly adopted a resolution declaring the right to interpose its sovereign powers, in the case of a deliberate, palpable and dangerous exercise by the Federal government of powers not granted to the Federal government under the Constitution. The text of the Virginia Resolution appeared on this page yesterday.

(Virginia's action brought opposing resolutions from the Legislatures of Delaware, Rhode Island, Massachusetts, New York, Connecticut, New Hampshire and Vermont. Those communications were referred to a committee of the Virginia House of Delegates headed by James Madison. In 1799 this committee brought in a report in which Madison examined the New England objections. An excerpt from the committee report, of interest to Virginians today, follows.)

...The next position is, that the General Assembly views the powers of the Federal Government "as limited by the plain sense and intention of the instrument constituting that compact," and "as no farther valid than they are authorized by the grants therein enumerated." It does not seem possible that any just objection can lie against either of these causes.

The first amounts merely to a declaration that the compact ought to have the interpretation plainly intended by the parties to it; the other, to a declaration that it ought to have the execution and effect intended by them. If the powers granted be valid, it is solely because they are granted; and if the granted powers are valid because granted, all other powers not granted must not be valid.

The resolution having taken this view of the Federal compact, proceeds to infer "that, in the case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the States who are parties thereto have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them."

IT APPEARS TO your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be made the rightful judges, in the last resort, whether the bargain has been pursued or violated.

The Constitution of the United States was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation.

The States, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must decide themselves, in the last resort, such questions as may of sufficient magnitude to require their interposition.

IT DOES NOT follow, however, because the States, as sovereign parties to their constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed either in a hasty manner or on doubtful and inferior occasions. Even in the case of ordinary conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole—every part being deemed a condition of every other part, and of the whole—it is always laid down that the breach must be both wilful and material, to justify an application of the rule. But in the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only deeply essentially affecting the vital principles of their political system.

The resolution has, accordingly, guarded against any apprehension of its object, by expressly requiring for such an interposition "the case of a *deliberate, palpable,* and *dangerous* breach of the Constitution by the exercise of *powers not granted* by it.

It must be a case, not of a light and transient nature, but of a nature *dangerous* to the great purpose for which the Constitution was established. It must be a case, moreover, not obscure or doubtful in its construction, but plain and *palpable.* Lastly it must be a case not resulting from a partial consideration or hasty determination, but a case stamped with a final consideration and *deliberate* adherence.

It is not necessary, because the resolution does not require, that the question should be discussed, how far the exercise of any particular power, ungranted by the Constitution, would justify the interposition of the parties to it. As cases might easily be stated which none would contend ought to fall within that description, cases, on the other hand, might with equal ease be stated, so flagrant and so fatal as to unite every opinion in placing them within the description.

BUT THE RESOLUTION has done more than guard against misconstruction, by expressly referring to cases of a *deliberate, palpable* and *dangerous* nature. It specifies the object of the interposition which it contemplates to be solely that of arresting the progress of the *evil* of usurpation, and of maintaining the authorities, rights, and liberties appertaining to the States as parties to the Constitution.

From this view of the resolution, it would seem inconceivable that it can incur any just disapprobation from those who, laying aside all momentary impressions, and recollecting the genuine source and object of the Federal Constitution, shall candidly and accurately interpret the meaning of the General Assembly.

If the deliberate exercise of dangerous powers, palpably withheld by the Constitution, could not justify the parties to it in interposing even so far as to arrest the progress of the evil, and thereby to preserve the Constituti
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November 23, 1955

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te exercise of dangerous powheld by the Constitution, could rties to it in interposing even t the progress of the evil, and thereby to preserve the Constitution itself, as well as to provide for the safety of the parties to it, there would be an end to all relief from usurped power, and a direct subversion of the rights specified or recognized under all the State Constitutions, as well as a plain denial of the fundamental principle on which our independence was declared.

BUT IT IS OBJECTED that the judicial authority is to be regarded as the sole expositor of the Constitution, in the last resort; and it may be asked for what reason the declaration by the General Assembly, supposing it to be theoretically true, could be required at the present day, and in so solemn a manner.

On this objection it might be observed, first, that there may be instances of usurped power, which the forms of the Constitution would never draw within the control of the judicial department; secondly, that if the decision of the judiciary be raised above the authority of the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final with the decisions of that department.

But the proper answer to the objection, is that the resolution of the General Assembly relates to those great and extraordinary cases *in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it.*

The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, *but that the judicial department may also exercise or sanction dangerous powers beyond the grant of the Constitution,* and, consequently, that the ultimate right of the parties to the Constitution to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority as well as by another; by the judiciary as well as by the executive or the legislature.

HOWEVER TRUE, therefore, it may be that the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the Government; *not in relation to the rights of the parties to the constitutional compact,* from which the judicial as well as the other departments hold their delegated trusts.

On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve.

The truth declared in the resolution being established, the expediency of making the declaration at the present day may safely be left to the temperate consideration and candid judgment of the American public. It will be remembered that a frequent recurrence to fundamental principles is solemnly enjoined by most of the State Constitutions, and particularly by our own, as a necessary safeguard against the danger of degeneracy to which republics are liable, as well as other governments, though in a less degree than others.

And a fair comparison of the political doctrines not unfrequent at the present day with those which characterized the epoch of our Revolution, and which form the basis of our republican constitutions, will best determine whether the declaratory recurrence here made to those principles ought to be viewed as unseasonable and improper, or as a vigilant discharge of an important duty. The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind, *and at no time, perhaps, more necessary than at present....*

November 23, 1955

Late Hour for Liberties

We have come this far in an editorial consideration of what Jefferson and Madison long ago termed a State's "right of interposition":

First, that the right exists; it was enunciated by the most illustrious of America's great men in the earliest days of the republic; it was described by Calhoun, in the great address reprinted on this page today, as "the fundamental principle of our system, resting on facts historically as certain as our revolution itself, and deductions as simple and demonstrative as that of any political or moral truth whatever."

Secondly, that the nature of the right lies in the inherent power of American States, as sovereign parties to a joint compact, to protest a breach of that compact by the Federal government they have jointly created. It is the right of a State, when it believes such a breach has been committed, to appeal to its sister States for adoption or rejection of a constitutional amendment, in order that a question of contested power may be set at rest.

Thirdly, that the exercise of the right is limited to certain grave and extraordinary cases. The breach of understood powers must be, in Madison's phrase, "deliberate, palpable and dangerous." The encroachment of the Federal government must "deeply and essentially affect vital principles of a State's political system." The right is not to be invoked "in cases of little urgency or importance."

Once Georgia Interposed

We would now submit that Governor Stanley and the Gray Commission may wish to explore the forms in which this right has been exercised in the past. On Monday, attention was directed to the historic Kentucky and Virginia Resolutions of 1798, in which interposition took the form of a ringing protest, avowing the unconstitutionality of the Alien and Sedition Acts. We may recall Madison's clear statement that "farther measures" could have been taken by the General Assembly.

It is of keen interest to reflect upon a still earlier exercise of the right of interposition, with a contemporary analogy too clear to be overlooked.

When the Constitution originally was ratified, it was with the plain understanding of the ratifying States that the judicial power of the Federal Courts would not extend to claims brought against a sovereign State. This was nowhere spelled out in the compact. It was simply understood, as men in their daily lives rely in every field upon understandings not put in words.

Yet the Federalist Supreme Court, in the teeth of this understanding, undertook to hear a claim against Georgia and entered an order compelling Georgia to pay. Georgia flatly refused. (The Georgia House of Representatives even passed a bill, which never became law, providing that any Federal marshal who attempted to enforce the mandate would be hanged). It was Georgia's position that this power had *not* been granted to the Federal government. It was the court's position that it *had* been granted. So Georgia, in effect, invoked in 1792 the right of interposition: Georgia called upon all of the States to decide the issue. And in 1795, the States ratified the Eleventh Amendment by which Georgia was declared right, and the court wrong.

While this appeal to the primary sovereignty of the people was pending, Georgia naturally withheld payment of the claim.

It is a late hour, we confess, to suggest that Governor Stanley and the Gray Commission ponder the interposition of Georgia 160 years ago, in terms of its possible application to Virginia's problem today.

It is a late hour to submit that Virginia may learn something from the defiance of Northern States, in the 1850s, through their Personal Liberty Laws. The enforcement of these State enactments, in the very teeth of the Supreme Court's opinion in the Dred Scott case, may indicate that States are not quite so helpless before the court as we have assumed. In the history of the enforcement of the Personal Liberty Laws may be found, also, a precedent on this point: That a State, or a group of States, may defy the court on one question and remain wholly obedient to its orders on every other, the while remaining in the Union.

What Did the War Change?

Now, it will be objected that all of this was settled by the Civil War; that the North's victory over the South established the supremacy of the Federal government not only militarily but constitutionally also. That the war established a certain military supremacy, Virginia would be the last to deny; the war, if it proved anything, proved that when one group of States is determined by force to contest the effort of another group of States to withdraw from the Union, law and sovereign rights are blown to the four winds and the issue is resolved on naked force alone.

But if the war also established the constitutional supremacy of the Federal government over the member States of the Union, then this fact surely would have been spelled out for us to read in the Constitution today. This nowhere appears. The three Reconstruction Amendments provided, first, that slavery shall not exist "within the United States, or any place subject to *their* [not *its*] jurisdiction"; secondly, that the right to vote shall not be abridged on account of race; and thirdly, in the vague and uncertain language of the Fourteenth Amendment, that

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person liberty or property without due pro law, nor deny to any person within it diction the equal protection of the lav

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These were all the amendments to the Constitution that were made in the period immediately following the war. The Thirteenth Amendment was declared ratified in 1865, the Fourteenth in 1868, the Fifteenth in 1870. A period of 43 years then elapsed before the Constitution was modified again. The significant point is that the Reconstruction Amendments in no way altered the basic structure of the compact. Ours is still a Union *of States,* each State retaining certain sovereign rights that it never has surrendered to the general government, each State still entitled to make its own decisions except where a power has been prohibited to the States by the Constitution.

The Clear Understanding:

Let us come down, then, to the specific issue of public schools and other public facilities.

We will note, first, that the very Congress—the Thirty-ninth Congress—that proposed the Fourteenth Amendment for ratification itself established separate schools in the District of Columbia.

There was implicit understanding among the States that the amendment in no way prohibited the operation of separate schools. This understanding was expressly confirmed by the Supreme Court in 1896, and again expressly confirmed by a unanimous Supreme Court in 1927.

For a period of more than 80 years, the States acquiesced in this understanding. It was agreed that what was prohibited to the States in this field was the right to operate separate but *unequal* schools. And pursuant to this agreement and understanding, the South, struggling from the poverty and ruins of Reconstruction, painfully began to build up a school system that would provide some education for her children.

Nine Men, or 36 States?

On May 17, 1954, *not* by action of three-fourths of the States *but on the naked and arrogant declaration of nine men,* the Supreme Court itself undertook to wipe out this long understanding and *by its own act,* in effect to amend the Constitution. In that moment, nine men arrogated unto themselves powers vested by the Constitution in the people of not fewer than 36 States.

We would submit most earnestly to Governor Stanley, and to the Gray Commission, that they consider whether Virginia, summoning to her aid the great voices of Madison and Jefferson, should not protest this rape of the Constitution with all the power and eloquence at our command.

Can we not ask of our sister States, in honor and in dignity, that if the court's opinion actually be the people's will, then the people should spell it out so that all uncertainty will be ended? If the power to operate separate schools and other public facilities is to be prohibited to the States, should not this grave and drastic change in public powers be nailed into the Constitution by appropriate amendment?

Let us ponder this transcendent issue. Already the Supreme Court, bent upon destroying the constitutional understandings of more than 80 years, has ordered an end to separate schools and parks. The next wind that blows from the court will take with it a State's power to prohibit interracial marriage. One by one, the reserved powers of sovereign States will be swept away. Unless interposition is made now, in a desperate effort to halt this process of judicial amendment of the Constitution, the States inevitably will be reduced to nonentities and the whole structure of our Union will be radically altered.

Think upon these things, Virginians!

Whether one opposes racial integration, as we do, or supports integration, as many do, is beside the point. All Virginians, liberal and conservative alike, from the Tidewater or the Valley, are united in a devotion to the Constitution and a reverence for its proper administration. If we fail now to make at least the effort to preserve the Constitution from the greedy hands of the Supreme Court, bent upon shaping it as a thing of wax, we shall have failed as Americans and Virginians in an hour of solemn crisis.

The editorials of November 23 were accompanied by the following excerpt from John C. Calhoun's Fort Hill address of July, 1831.

'Interposition' Is Basic Right of Sovereign States, John Calhoun Believed

THE QUESTION of the relation which the States and General Government bear to each other is not one of recent origin. From the commencement of our system, it has divided public sentiment. Even in the Convention, while the Constitution was struggling into existence, there were two parties as to what this relation should be, whose different sentiments constituted no small impediment in forming that instrument.

After the General Government went into operation, experience soon proved that the question had not terminated with the labours of the Convention. The great struggle that preceded the political revolution of 1801, which brought Mr. Jefferson into power, turned essentially on it, and the doctrines and arguments on both sides were imbodied and ably sustained: on the one, in the Virginia and Kentucky Resolutions, and the Report to the Virginia Legislature; and on the other, in the replies of the Legislature of Massachusetts and some of the other States.

These resolutions and this report, with the decision of the Supreme Court of Pennsylvania about the same time (particularly in the case of Cobbett, delivered by Chief Justice McKean and concurred in by the whole bench), contain what I believe to be the true doctrine on this important subject. I refer to them in order to avoid the necessity of presenting my views, with the reasons in support of them, in detail . . .

THE GREAT AND leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact, to which each State is a party, in the character already described; and that the several States, or parties, have a right to judge of its infractions; and in case of a deliberate, palpable, and dangerous exercise of power not delegated, they have the right, in the last resort, to use the language of the Virginia Resolutions, *"to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties appertaining to them."*

THIS RIGHT of interposition, thus solemnly asserted by the State of Virginia, be it called what it may—State-right, veto, nullification, or by any other name—I conceive to be the fundamental principle of our system, resting on facts historically as certain as our revolution itself, and deductions as simple and demonstrative as that of any political or moral truth whatever; and I firmly believe that on its recognition depends the stability and safety of our political institutions.

I am not ignorant that those opposed to the doctrine have always, now and formerly, regarded it in a very different light, as anarchical and revolutionary. Could I believe such, in fact, to be its tendency, to me it would be no recommendation. I yield to none, I trust, in a deep and sincere attachment to our political institutions and the union of these States. . . .

With these strong feelings of attachment, I have examined, with the utmost care, the bearing of the doctrine in question; and so far from anarchical or revolutionary, I solemnly believe it to be the only solid foundation of our system, and of the Union itself; and that the opposite doctrine, which denies to the States the right of protecting their reserved powers, and which would vest in the General Government (it matters not through what department) the right of determining, exclusively and finally, the powers delegated to it, is incompatible with the sovereignty of the States, and of the Constitution itself, considered as the basis of a Federal Union.

As strong as this language is, it is not stronger than that used by the illustrious Jefferson, who said to give to the General Government the final and exclusive right to judge of its powers, is to make "its discretion, and not the Constitution, the measure of its powers"; and that, "in all cases of compact between parties having no common judge, each party has an equal right to judge for itself, as well of the infraction as of the mode and measures of redress." Language cannot be more explicit, nor can higher authority be adduced . . .

IT HAS BEEN well said by one of the most sagacious men of antiquity, that the object of a constitution is *to restrain the government*, as that of laws is *to restrain individuals*. The remark is correct; nor is it less true where the government is vested in a majority than where it is in a single or a few individuals—in a republic, than a monarchy or aristocracy.

So numerous and diversified are the interests of our country, that they could not be fairly represented in a single government, organized so as to give to each great and leading interest a separate and distinct voice. . . . A plan was adopted better suited to our situation, but perfectly novel in its character.

THE POWERS of government were divided, not, as heretofore, in reference to classes, but geographically. One General Government was formed for the whole, to which was delegated all the powers supposed to be necessary to regulate the interests common to all the States, leaving others subject to the separate control of the States, being, from their local and peculiar character, such that they could not be subject to the will of a majority of the whole Union, without the certain hazard of injustice and oppression.

It was thus that the interests of the whole were subjected, as they ought to be, to the will of the whole, while the peculiar and local interests were left under the control of the States separately, to whose custody only they could be safely confided. This distribution of power, settled solemnly by a constitutional compact, to which all the States are parties, constitutes the peculiar character and excellence of our political system. It is truly and emphatically American, without example or parallel.

TO REALIZE its perfection, we must view the General Government and those of the States as a whole, each in its proper sphere independent: each perfectly adapted to its respective objects; the States acting separately, representing and protecting the local and peculiar interests; acting jointly through one General Government, with the weight respectively assigned to each by the Constitution, representing and protecting the interest of the whole, and thus perfecting, by an admirable but simple arrangement, the great principle of representation and responsibility, without which no government can be free or just.

To preserve this sacred distribution as originally settled, by coercing each to move in its prescribed orb, is the great and difficult problem, on the solution of which the duration of our Constitution, of our Union, and, in all probability, our liberty depends. How is this to be effected?

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it to be the only solid foundation of our system, and of the Union itself; and that the opposite doctrine, which denies to the States the right of protecting their reserved powers, and which would vest in the General Government (it matters not through what department) the right of determining, exclusively and finally, the powers delegated to it, is incompatible with the sovereignty of the States, and of the Constitution itself, considered as the basis of a Federal Union.

As strong as this language is, it is not stronger than that used by the illustrious Jefferson, who said to give to the General Government the final and exclusive right to judge of its powers, is to make "its discretion, and not the Constitution, the measure of its powers"; and that, "in all cases of compact between parties having no common judge, each party has an equal right to judge for itself, as well of the infraction as of the mode and measures of redress." Language cannot be more explicit, nor can higher authority be adduced . . .

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The question is new when applied to our political organization, where the separate and conflicting interests of society are represented by distinct but connected governments; but it is, in reality, an old question under a new form, long since perfectly solved.

Whenever separate and dissimilar interests have been separately represented in any government; whenever the sovereign power has been divided in its exercise, the experience and wisdom of ages have devised but one mode by which such political organization can be preserved—the mode adopted in England, and by all governments, ancient and modern, blessed with constitutions deserving to be called free—*to give to each co-estate the right to judge of its own powers, with a negative or veto on the acts of others, in order to protect against encroachments the interests it particularly represents. . .*

SO ESSENTIAL is the principle, that to withhold the right from either, where the sovereign power is divided, is, in fact, *to annul the division itself*, and to *consolidate* in the one left in the exclusive possession of the right *all* powers of government; for it is not possible to distinguish, practically, between a government having all power, and one having the right to take what powers it pleases. . . .

These truths do seem to me to be incontrovertible; and I am at a loss to understand how anyone, who has maturely reflected on the nature of our institutions, or who has read history and studied the principles of free government to any purpose, can call them in question.

The explanation must, it appears to me, be sought in the fact that in every free state there are those who look more to the necessity of maintaining power than guarding against its abuses. . . . If such be the true cause, I must think the fear of weakening the government too much in this case to be in a great measure unfounded, or, at least, that the danger is much less from that than the opposite side. . . .

So far from extreme danger, I hold that there never was a free state in which this great conservative principle, indispensable to all, was ever so safely lodged. In others, when the co-estates representing the dissimilar and conflicting interests of the community came into contact, the only alternative was compromise, submission, or force.

Not so in ours.

Should the General Government and a State come into conflict, we have a higher remedy: The power which called the General Government into existence, which gave it all its authority, and can enlarge, contract, or abolish its power at its pleasure, may be invoked.

The States themselves may be appealed to, three-fourths of which, in fact, form a power whose decrees are the Constitution itself, and whose voice can silence all discontent.

THE UTMOST EXTENT, then, of the power is, that a State acting in its sovereign capacity, as one of the parties to the constitutional compact, *may compel the government, created by that compact, to submit a question touching its infraction to the parties who created it;* to avoid the supposed dangers of which, it is proposed to resort to the novel, the hazardous, and, I must add, fatal project of giving to the General Government the sole and final right of interpreting the Constitution, thereby reversing the whole system, making that instrument the creature of its will instead of a rule of action impressed on it at its creation, and annihilating, in fact, the authority which imposed it, and from which the government itself derives its existence.

JOHN C. CALHOUN

Continued

That such would be the result, were the right in question vested in the legislative or executive branch of the government, is conceded by all. No one has been so hardy as to assert that Congress or the President ought to have the right, or deny that, if vested finally and exclusively in either, the consequences which I have stated would necessarily follow; but its advocates have been reconciled to the doctrine, on the supposition that there is one department of the General Government which, from its peculiar organization, affords an independent tribunal through which the government may exercise the high authority which is the subject of consideration, with perfect safety to all.

I yield, I trust, to few in my attachment to the judiciary department. I am fully sensible of its importance, and would maintain it to the fullest extent in its constitutional powers and independence; but it is impossible for me to believe that it was ever intended by the Constitution that it should exercise the power in question, or that it is competent to do so; and, if it were, that it would be a safe depository of the power . . .

IT IS A UNIVERSAL and fundamental political principle, that the power to protect can safely be confided only to those interested in protecting, or their responsible agents—a maxim not less true in private than in public affairs. The danger in our system is, that the General Government, which represents the interests of the whole, may encroach on the States, which represent the peculiar and local interests, or that the latter may encroach on the former.

In examining this point, we ought not to forget that the government, through all its departments, judicial as well as others, is administered by delegated and responsible agents; and that the power which really controls, ultimately, all the movements, is not the agents, *but those who elect or appoint them.*

To understand, then, its real character, and what would be the action of the system in any supposable case, we must raise our view from the mere agents to this high controlling power, which finally impels every movement of the machine. By doing so, we shall find all under the control of the will of a majority, compounded of the majority of the States, taken as corporate bodies, and the majority of the people of the States, estimated in Federal numbers.

These, united, constitute the real and final power which impels and directs the movements of the General Government . . .

The judges are, in fact, as truly the judicial representatives of this united majority, as the majority of Congress itself, or the President, is its legislative or executive representative; and to confide the power to the judiciary to determine finally and conclusively what powers are delegated and what reserved, would be, in reality, to confide it to the majority, whose agents they are, and by whom they can be controlled in various ways; and, of course, to subject (against the fundamental principle of our system and all sound political reasoning) the reserved powers of the States, with all the local and peculiar interests they were intended to protect, to the will of the very majority against which the protection was intended. Nor will the tenure by which the judges hold their office, however valuable the provision in many other respects, materially vary the case. Its highest possible effect would be to retard, and not finally to resist, the will of the dominant majority.

BUT IT IS USELESS to multiply arguments. Were it possible that reason could settle a question where the passions and interests of men are concerned, this point would have been long since settled forever by the State of Virginia.

The report of her Legislature, to which I have already referred, has really, in my opinion, placed it beyond controversy. Speaking in reference to this subject, it says:

"It has been objected" (to the right of a State to interpose for the protection of her reserved rights) "that the judicial authority is to be regarded as the sole expositor of the Constitution.

"On this subject, it might be observed, first, that there may be instances of usurped powers which the forms of the Constitution could never draw within the control of the judicial department; secondly, that if the decision of the judiciary be raised above the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final with the decisions of that department.

"But the proper answer to the objection is, that the resolution of the General Assembly relates to those great and extraordinary cases in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it.

"The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the judicial department may also exercise or sanction dangerous powers, beyond the grant of the Constitution, and, consequently, that the ultimate right of the parties to the Constitution to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another —by the judiciary, as well as by the executive or legislative."

AGAINST THESE conclusive arguments, as they seem to me, it is objected that, if one of the parties has the right to judge of infractions of the Constitution, so has the other; and that, consequently, in cases of contested powers between a State and the General Government, each would have a right to maintain its opinion, as is the case when sovereign powers differ in the construction of treaties or compacts, and that, of course, it would come to be a mere question of force.

The error is in the assumption that the General Government is a party to the constitutional compact.

The States, as has been shown, form the compact, acting as sovereign and independent communities. The General Government is but its creature; and though, in reality, a government with all the rights and authority which belong to any other government, within the orbit of its powers, it is, nevertheless, a government emanating from a compact between sovereigns, and partaking, in its nature and object, of the character of a joint commission, appointed to superintend and administer the interests in which all are jointly concerned, but having, beyond its proper sphere, no more power than if it did not exist.

To deny this would be to deny the most incontestible facts and the clearest conclusions; while to acknowledge its truth is to destroy utterly the objection that the appeal would be to force, in the case supposed.

For, if each party has a right to judge, then, under our system of government, *the final cognizance of a question of contested power would be in the State, and not in the General Government.* It would be the duty of the latter, as in all similar cases of a contest, between one and more of the principals and a joint commission or agency, to refer the contest to the principals themselves. Such are the plain dictates of both reason and analogy.

On no sound principle can the agents have a right to final cognizance, as against the principals, much less to use force against them to maintain their construction of their powers. Such a right would be monstrous, and has never, heretofore, been claimed in similar cases.

THAT THE DOCTRINE is applicable to the case of a contested power between the States and the General Government, we have the authority not only of reason and analogy, but of the distinguished statesman already referred to. Mr. Jefferson, at a late period of his life, after long experience and mature reflection, says, "With respect to our State and Federal Governments, I do not think their relations are correctly understood by foreigners. They suppose the former are subordinate to the latter. This is not the case. They are coordinate departments of one simple and integral whole. But you may ask, if the two departments should claim each the same subject of power, where is the umpire to decide between them?

"In cases of little urgency or importance, the prudence of both parties will keep them aloof from the questionable ground; but, if it can neither be avoided nor

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"In cases of little urgency or importance, the prudence of both parties will keep them aloof from the questionable ground; but, if it can neither be avoided nor compromised, a convention of the States must be called *to ascribe the doubtful power to that department which they may think best."*

IT IS THUS that our Constitution, by authorizing amendments, and by prescribing its authority and mode of making them, has, by a simple contrivance, with its characteristic wisdom, provided a power which, in the last resort, supercedes effectually the necessity, and even the pretext, for force: A power to which none can fairly object; with which the interests of all are safe, which can definitely close all controversies in the only effectual mode, by freeing the compact of every defect and uncertainty, *by amendment of the instrument itself.*

It is impossible for human wisdom, in a system like ours, to devise another mode which shall be safe and effectual, and, at the same time, consistent with what are the relations and acknowledged powers of the two great departments of our government. It gives a beauty and security peculiar to our system, which, if duly appreciated, will transmit its blessings to the remotest generations; but, if not, our splendid anticipation of the future will prove but an empty dream.

STRIPPED OF all its covering, the naked question is, whether ours is a federal or a consolidated government; a constitutional or absolute one; a government resting ultimately on the solid basis of the sovereignty of the States or on the unrestrained will of a majority; a form of government, as in all other unlimited ones, in which injustice, and violence and force must finally prevail.

Let it never be forgotten that, where the majority rules without restriction, the minority is the subject; and that, if we should absurdly attribute to the former the exclusive right of construing t h e Constitution, there would be, in fact, between the sovereign and subject, under such a government, no constitution, or, at least, nothing deserving the name, or serving the legitimate object of so sacred an instrument.

How the States are to exercise this high power of interposition, which constitutes so essential a portion of their reserved rights that it cannot be delegated without an entire surrender of their sovereignty, and converting our system from a federal into a consolidated government, is a question that the States only are competent to determine. The arguments which prove that they possess the power, equally prove that they are, in the language of Jefferson, "the rightful judges of the mode and measure of redress."

But the spirit of forebearance, as well as the nature of the right itself, forbids a recourse to it, except in cases of dangerous infractions of the Constitution; and then only in the last resort, when all reasonable hope of relief from the ordinary action of the government has failed; when, if the right to interpose did not exist, the alternative would be submission and oppression on one side, or resistance by force on the other.

THAT OUR SYSTEM should afford, in such extreme cases, an intermediate point between these dire alternatives, by which the government may be brought to a pause, and thereby an interval obtained to compromise differences, or, if impracticable, be compelled to submit the question to a constitutional adjustment, through an appeal to the States themselves, is an evidence of its high wisdom: An element not, as is supposed by some, of weakness, but of strength; not of anarchy or revolution, but of peace and safety.

Its general recognition would, of itself, in a great measure, if n o t altogether, supercede the necessity of its exercise, by impressing on the movements of the government that moderation and justice so essential to harmony and peace, in a country of such vast extent and diversity of interests as ours; and would, if controversy should come, turn the resentment of the aggrieved from the system to those who had abused its powers (a point all-important), and cause them to seek redress, not in revolution or overthrow, but in reformation.

It is, in fact, properly understood, a substitute, where the alternative would be force, tending to prevent, and, if that fails, to correct peaceably the aberrations to which all systems are liable, and which, if permitted to accumulate without correction, must finally end in a general catastrophe. . . .

November 28, 1955

An Old Doctrine, Still New

With our readers' indulgence, we would return now to the editorial discussion launched last week of the "right of interposition." The longer we have examined this principle of government, the more strongly we are persuaded that the right existed when the Union was formed; that nothing has occurred since then that has abolished the right; that it still exists; and that its assertion by the Virginia General Assembly might well serve to check the United States Supreme Court in its usurpation of power. At the very least, a fresh enunciation of this cardinal principle of our Union would serve to provoke widespread reflection upon this nation's drift from historic moorings.

The right of interposition, as enunciated by Jefferson, Madison, Calhoun, Hayne, Randolph and many others, is seen historically as the States' right to interpose their sovereignty between the Federal Government and the object of its encroachments upon powers reserved to the States. This right rests in the incontrovertible theory that ours is a Union of sovereign States; that the Federal Government exists only by reason of a solemn compact among the States; that each respective State is a coequal party to this compact; that if the compact is violated by the Federal government, every State has a right to judge of the infraction; and that when an issue of contested power arises, *only the States themselves,* by constitutional process, may finally decide the issue.

In last week's presentation, we dwelled especially upon the enunciation of this right in Southern States from time to time. It is well to recall that Southerners have been by no means alone in declaring that in grave and extraordinary cases, the States may challenge an action taken by the Federal government.

New England Proclaimed the Right

In December of 1814, at a time of intense opposition in the New England States to the War of 1812, a convention met at Hartford to consider a number of constitutional questions. Delegates were elected to this convention from Connecticut, Massachusetts, Rhode Island, New Hampshire and Vermont; and except for the last two States, where delegates were chosen by local conventions, the delegates were named by State Legislatures. The Hartford convention has often been ridiculed, but there is no question of the seriousness of its purpose or the validity of the delegates' credentials.

Out of the Hartford convention, among other resolutions, came this declaration:

"In cases of deliberate, dangerous and palpable infractions of the Constitution, affecting the sovereignty of a State and the liberties of the people, it is not only the right, but the duty of such State to interpose its authority for their protection, *in the manner best calculated to secure that end.* When emergencies occur which are either beyond the reach of judicial tribunals, or too pressing to admit of the delay incident to their forms, States which have no common umpire must be their own judges and execute their own decisions." (Our italics.)

As events turned out, Jackson's victory at New Orleans in January of 1815, and the following month's Peace of Ghent, put at rest the peculiar problems that had aroused a desire for interposition. Yet the declaration remains as a solemn expression from New England, echoing the very position Virginia and Kentucky had asserted 16 years earlier.

Wisconsin Proclaimed the Right

For a second example of the assertion of this right, outside the South, we may look at events in Wisconsin in 1858 and 1859. We may recall that Congress, in 1850, had enacted the Fugitive Slave Law, and the Supreme Court, in 1857, had followed this with the Dred Scott decision upholding slavery as a practice reserved to the States to regulate.

The abolition movement was especially strong in Wisconsin; and when a United States marshal at Racine attempted to arrest and return a fugitive slav Joshua Glover, a mob of irate led by a Milwaukee editor nam man M. Booth, broke into a jail Glover, and prevented his retur was arrested for violation of the act, but the Wisconsin State Court intervened with a writ o corpus, and for a period of seve —until the onset of war—the V court waged a defiant battle United States Supreme Court.

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In this battle, the Wisconsin court had the support of the Wisconsin General Assembly. Let us look at Joint Resolution No. 4 of the Wisconsin Legislature, adopted March 19, 1859. After declaring that the United States Supreme Court had acted "without process, or any of the forms recognized by law," the Legislature denounced the court's "assumption of power" and said the court's effort "to become the final arbiter" was in direct conflict with the Constitution. The resolution continued:

"Resolved, that this assumption of jurisdiction by the Federal judiciary in the said case, and without process, is an act of undelegated power, and therefore without authority, void and of no force.

"Resolved, that the government formed by the Constitution of the United States was not made the exclusive or final judge of the extent of the powers delegated to itself, but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

"Resolved, that the principle and construction contended for . . . that the general government is the exclusive judge of the extent of powers delegated to it, stops nothing short of despotism, since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers; that the several States which formed that instrument have the unquestionable right to judge of its infraction; and that a positive defiance by those sovereignties, of all unauthorized acts done or attempted to be done under color of that instrument is the rightful remedy."

Again, the voice of Jefferson and Madison, this time after 61 years; and this powerful statement of "positive defiance" came not from the South, but from Wisconsin. And again, may we suggest that the issue of contested power asserted by Wisconsin was ultimately to be resolved, so far as the Constitution is concerned, by constitutional amendment? Just as Georgia in 1792 compelled adoption of the Eleventh Amendment, prohibiting Federal courts from hearing claims against a State, so the Northern States finally were to nail into the Constitution the Thirteenth Amendment, prohibiting slavery.

Iowa Successfully Challenged

One further instance of successful challenge of the court's authority, from outside the South, may be noted. In the period immediately after the Civil War, an Iowa Legislature undertook to give large favors and grants to the expanding railroads. The Iowa Supreme Court at first held these grants lawful. Then a subsequent Iowa court held the grants unlawful. The United States Supreme Court, which then was exceedingly pro-railroad, attempted to reverse the second position of the Iowa court.

Professor Fred Rodell of Yale University has described what happened, in his recent book, *Nine Men*: "[The justices] saw their orders disobeyed and flouted. . . . The Iowa Supreme Court did indeed disregard the U. S. Supreme Court's orders in three consecutive cases until it forced the high tribunal, devoid at that time of the prestige that underlies its power, to ignominiously back down."

The Ultimate Appeal

We may note, in concluding this brief sketch of challenges to the Supreme Court's authority, this aspect of the story: Georgia defied the court in the 1790's, refused to obey its orders, and remained in the Union as a loyal and obedient State in every other regard. So, too, did Wisconsin 60 years later defy the court, refuse to obey its orders, and remain in the Union as a loyal and obedient State in every other regard. So, too, did Iowa, in the 1870's and 1880's, defy the court, refuse to obey its orders, and remain in the Union as a loyal and

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obedient State in every other regard.

The point is simply that to contest an assertion of authority by a Federal agency, through solemn reliance on the reserved powers of the States, is not rebellion, anarchy or revolution, It is a process of ultimate appeal; and the Southern States, we firmly believe, have every right: First, to interpose their sovereignty in order that such an appeal may be taken in so flagrant a case as the Supreme Court's reversal of a long-established construction of the Constitution; and secondly, to submit that while the appeal is pending—while the States are considering a constitutional amendment which, by ratification, would sustain the court, or by rejection, would rebuke the court—such great and irrevocable damage would be done to our public education that further efforts to compel racial integration, as a condition of maintaining public schools, should properly be stayed.

We can imagine the scorn and ridicule with which such an approach may be greeted by the NAACP, and by centralists who believe in the absolute supremacy of the Federal government. Beyond doubt, there are many who believe—and sincerely believe—that the Supreme Court has only to usurp a power for the power to be effectively seized from the States; and that as many as 35 States are powerless to resist so long as merely 13 States are agreeable to the encroachment.

We cannot believe this is a fair or reasonable interpretation of the clear intent of the Founding Fathers, who prudently—and prophetically—placed such great emphasis upon the sovereignty of the *respective* States. The great men who erected our Union, erected it upon the foundation of States rights and reserved powers. Surely there can be no argument with the proposition that if this foundation is now to be destroyed, it should be by constitutional process, and not by judicial legislation.

The General Assembly of Virginia was to meet in special session on Wednesday, November 30, 1955. On the evening of Tuesday, November 29, the following editorial appeared.

Interposition, Now!

With the publication on today's editorial page of Virginia's Resolution of 1829, this newspaper concludes its presentation of the historical background of the Right of Interposition. In the past week, we have offered excerpts from the Kentucky and Virginia Resolutions of 1798, the Madison Report of 1799, the Hartford Convention of 1814, Calhoun's address of 1831, the resolutions of the Wisconsin Legislature in 1859, and other material touching upon the right of sovereign States to challenge a usurpation of power by the General Government they have created.

These examples could be multiplied, for the amazing thing—as one delves into the subject—is not how seldom the States have resisted encroachment upon their powers, but how frequently they have arisen in their sovereign capacities and asserted the solemn powers so clearly inherent in the nature of our Union.

The resolution that occupies our page today is offered as one more assertion of this right, one more eloquent exposition of the fundamental principles upon which our Union was formed It is not as moving, perhaps, as Madison's beautifully phrased Report of 1799, yet it merits a reading upon this eve of a session of the General Assembly of Virginia. For here is enunciated, in wonderfully clear terms, the tradition of Virginia's Assembly in the face of Federal encroachments: Whenever an attempt has been made to pervert the Constitution, said the Assembly in 1829, "Virginia has even been prompt to avow her unqualified disapprobation, and manifest her undisguised discontent."

More than this: "To subject our local or domestic affairs to any other authority than our own Legislature would be to expose to certain destruction the happiness and prosperity of the people of Virginia."

Responsibility Lies Upon the Legislature

And beyond this lies the comment that the founders of our Nation apprehended that "the sacred liberty of the American citizen should be invaded by the arbitrary acts of the General Government." How could these apprehensions be
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could these apprehensions be allayed? Only by the assurance and conviction "that the State Governments were adequate to the resistance of Federal encroachments." It is the Legislatures of the several States, said Virginia's General Assembly in 1829, which are "the guardians of our political institutions," and it is their sacred duty to preserve these institutions unimpaired.

That brings our discussion, then, at long last, to tomorrow's session of the General Assembly.

The question we would submit to the Assembly—the "transcendent issue" that surpasses any questions of racial segregation—is whether the compact among the sovereign States has been violated by the Supreme Court; and if the compact has been violated, whether Virginia's General Assembly will meet the infraction with the same high courage, and the same eloquent reliance upon fundamental principles that Jefferson and Madison relied upon in years gone by.

That the Supreme Court acted unconstitutionally in its decision of May 17, 1954, this newspaper now asserts with all the earnestness at its command. Under the guise of "interpretation," the court so drastically cast aside the long-established construction of the Fourteenth Amendment as in effect to amend the amendment.

If that proposition be accepted, the remaining question, in the language of the resolution on this page today, is whether our State Government is "adequate to the resistance of Federal encroachments." If the Assembly fails to interpose now—if it fails to challenge this deliberate, palpable and dangerous encroachment of the Federal Government upon the amendatory rights of the States—our opportunity for effective action will have passed. It should be remembered that Virginia's Assembly has not met since the opinion of May, 1954. Ours is the challenging opportunity to speak now, to assert the existence of a contested power, to demand that our sister States—who alone have authority to decide such a contest—resolve the issue through constitutional process.

This newspaper has done everything within its power to suggest that such interposition is an age-old *right* of the Virginia Assembly. We would not be so presumptuous as to suggest that it is also a "sacred duty," but that is the term the Virginia Assembly itself employed in 1829.

Let us move, now, to the immediate present. Let us examine the benefits and advantages to be found in a legislative Resolution of Interposition, and ask ourselves if this is not the right, sound, and most eminently desirable course for Virginia to take.

Four Advantages Seen in Resolution

In the view of this newspaper, four prime considerations suggest the wisdom of the Assembly's adoption of a Resolution of Interposition.

The first of these (and if there were no more, this in itself would be sufficient) is simply that it is the course of right conduct. Whether or not such a resolution may be expedient, whether or not we win or lose, whether or not we are derided by centralists and scorned by the advocates of Federal supremacy, Virginia once more should enunciate the sovereignty of States; we should recur to fundamental principles. This is our heritage. This is our tradition. This was the philosophy of the great men who walked in the halls of our own Capitol; in the rights of States are the very guideposts of American Government, as the Resolution of 1829 made clear, that our fathers "happily pointed out to future generations." We ought not to repudiate them now. We ought, more properly, to express again our devotion to their high ideals of this Union, and by such an expression hope to awaken those States which have been so woefully apathetic to the Federal Government's encroachments upon their powers.

Secondly (and here we approach more immediate considerations), the General Assembly may well recognize that in defending racial segregation, we are defending a practice that to much of the Nation seems indefensible. We who live in the South know clearly the sound reasons that support the wisdom of a dual society; we know, vividly and by first-hand experience, the gulf that divides the mores of two disparate races.

We know these things, but others do not know. And the second advantage of the proposed resolution is that Virginia, by the adoption of such a resolution, might succeed in elevating this controversy from the regional field of segregation to the transcendent, national field of State sovereignty. There is a tactical advantage in higher ground, and we would do well to seek it.

The third point is this: The South desperately needs leadership. Virginia can provide it. Virginia, of all States, ought rightfully to provide it. We believe that if Virginia asserts the old right of interposition, other Southern States would rally to this standard, and would join us in demanding that a question of contested power be resolved by the sister States. Where one State alone might not be able to persuade the nation to hear a charge of encroachment, the appeals of five or six States would be more difficult to resist. In any event, the united action of several sovereign States would confront the court with infinitely more difficult problems in imposing its will upon a resentful people.

Plan Not in Conflict With Gray Commission

The fourth point (and here again we deal candidly with matters immediately at hand) is that a Resolution of Interposition would in no way conflict with the recommendations laid down by the Gray Commission. The proposals of Senator Gray's group go directly to intra-State, family problems peculiar to Virginia's school system. One proposal would broaden the existing provisions by which local school boards may assign pupils to particular schools. The second major proposal would broaden the power now vested in localities to aid industrial and technical schools, by permitting public funds generally to be spent—under certain circumstances—for the education of Virginia children in private schools. This second proposal is designed to care for those communities in which the final, grave step may one day be taken of choosing no schools instead of integrated schools; but this step can be pushed farther into the distance if Virginia will interpose her sovereign powers between the court and the localities so desperately affected.

This newspaper is supporting the program of the Gray Commission, and will continue to support it for what it is: The best possible program that can be devised if Virginia is to acknowledge the Supreme Court's authority and surrender to it. But let us not deceive ourselves: It is a program of expediency. The pupil assignment plan necessarily contemplates some integration; the tuition grant program necessarily embraces the prospect, in certain areas, of abandoning public schools as a last resort.

The doctrine of interposition, on the other hand, rests not on expediency but on fundamental principles. It relies upon the simple, eloquent assertion of a sovereign State that the Supreme Court has acted unconstitutionally; that we are not bound in honor, or in duty, or in law to abide by unconstitutional decrees; and that the power to operate separate public facilities is *not* a power prohibited to the States until this prohibition is clearly spelled out by valid constitutional amendment.

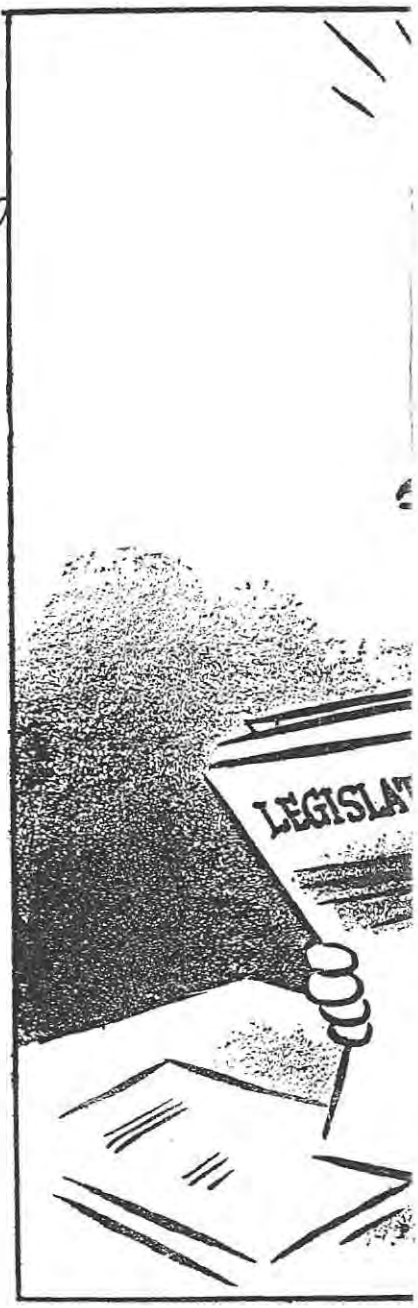
This newspaper would submit that Virginia can stand on fundamental principles, where on expediency we must fall.

Now Is the Time For State to Interpose

The Gray Commission meets at the Capitol tonight. We would appeal to the members of that Commission—and its members include some of the most able and devoted men of this Commonwealth —to consider most seriously an assertion of interposition; and to ask themselves, not whether such a Resolution would leave Virginia worse off (for we could not be worse off), but rather to look at the transcendent issue and to ask themselves if it is better for Virginia to surrender by implication to the usurpation of power by the Supreme Court, or to resist that usurpation straightforwardly.

We believe the question can be answered in one way only. It is by pressing for adoption of the Gray Commission's own program in Virginia; and beyond this, by saying to the Nation that Virginia's answer is:

Interposition, now!



This editorial of November 29 was accompanied by the text of Virginia's Resolution of 1829 (not here republished), in which the General Assembly reaffirmed the Doctrine of '98.

On the night of November 29, members of Virginia's Commission on Public Education (the Gray Commission) discussed interposition until long after midnight. They found the plan appealing, but felt time did not permit adequate debate of the Constitutional issues during a three-day special session called for another purpose entirely. A member of the Assembly, Senator Harry C. Stuart, publicly announced his intention to offer a Resolution of Interposition at the Assembly's regular session in January, 1956.

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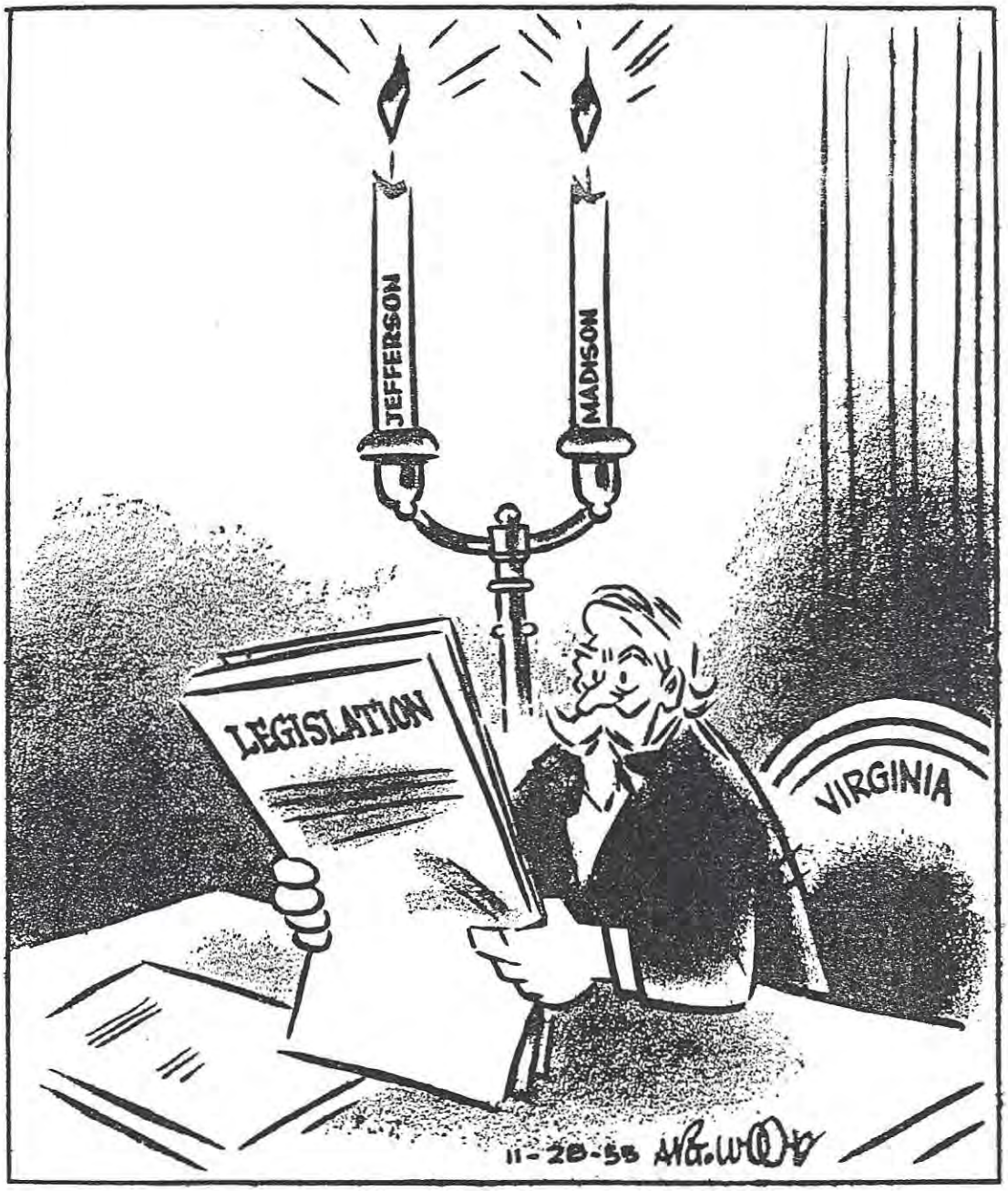

December 1, 1955

A Time for Correspondence

It is a matter of keen regret to this newspaper that, in seeking to comprehend the Supreme Court's opinion in school segregation cases, we did not long ago do what our State Constitution suggests that all of us do: We did not recur soon enough to fundamental principles. Had we begun to explore the right of interposition 16 months ago, instead of two weeks ago, it is possible that many others would have taken up the plan, examined it, and found in it the same safeguard against Federal tyranny that Jefferson and Madison envisioned so long ago.

For the pity is that the doctrine of interposition is just beginning to catch fire. The past two or three days have produced hundreds of telegrams and messages of encouragement from throughout Virginia, and indeed from a dozen other States; it would be a profitless repetition to publish more than a few of these in the Forum. Quite suddenly, others are in fact beginning to see what it took so long for us to see: That this "perfect Union" *must* embrace some means, some final check-and-balance, by which the States may prevent the Supreme Court from seizing their long reserved powers.

This means is to be found in what Jefferson, Madison, Calhoun and many others termed the "right of interposition." And if the right has not been exercised in nearly a hundred years, since Wisconsin last invoked it in 1859, the right remains to the States as a right inherent in their position as sovereign political entities, who are equal members of a joint compact.

We have no quarrel with leading members of the General Assembly who concluded regretfully yesterday morning that time simply did not permit, at this special session, the complete discussion of interposition that should be given so solemn a remedy. It had seemed to us that the Assembly's assertion of sovereign powers at its first possible opportunity since the court's decision would have carried the greatest meaning and impact. But the exigencies of time and the understood conditions of the Assembly's special session made it impossible to develop the plan properly. We are assured by more than a score of legislators that a suitable resolution of interposition will be offered at the regular session beginning in January.

In the meantime, a suggestion has been brought to us that has great merit: It is that the General Assembly set up, whether formally or informally, a "committee of correspondence" to explore the plan with other States.

It will be recalled that Sam Adams, in Massachusetts, established the first such committee in 1772, in order to acquaint New England towns, and the colonies generally, with Boston's views. Out of the work of his committee came such historic documents as the *State of the Rights of the Colonists*, and the *List of Infringements and Violations of Those Rights*. The Virginia House of Burgesses, in the Spring of 1772, established an 11-member Committee of Correspondence (Henry, Jefferson, and Richard Henry Lee were among its members), whose letters, circularized among the colonies, did much to fan the flames of liberty.

During the next two months, a similar Committee of Correspondence, formed of members of the Virginia House and Senate, could profitably exchange views with members of State Legislatures elsewhere. Through this device, Virginia legislators could reacquaint their equal numbers of other States with the proposal for interposition, and seek concurring action. From such an exchange could be formed a basis for a united appeal by Southern States to their sister States, urging them to awaken to the evils of judicial legislation that endanger not merely Southern States alone, but the very fabric of our Constitution.

This newspaper has some thanks to express, and would express them now. From the moment we began exploring this plan with members of the General Assembly, we have encountered nothing but the highest level of statesmanship and the greatest possible devotion to the principles of our government. Members of the House and Senate came from long distances to discuss the proposal at our request. They undertook personal research assignments, they spent hours in the hard discipline of pure thought. Attorney-General Almond presented the plan before the Gray Commission at its meeting Tuesday night; several members of the commission have told us that the ensuing discussion, lasting until nearly midnight, was an absorbing and inspiring rededication to the oldest principles of American Union. To these gen
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Given this same spirit of high statesmanship, we are hopeful that Virginia will speak again, at the regular session, in the language of Jefferson and Madison—that we will say again to our sister States, "we charge that the compact among us has been violated by the Federal Government we jointly created, and we appeal to you to settle a question of contested power by exercise of the ultimate sovereignty of the people of the respective States."

Through such an assertion, we are most hopeful, the attention of the entire country can be drawn to the Supreme Court's deliberate, dangerous and palpable abuse of its powers, and the people may be persuaded once again to find in fundamental principles a means for resisting Federal encroachments that, if not resisted, must inevitably destroy all rights of the States.

The concept of interposition spread rapidly through other States. Editorial comment began to appear in other newspapers. On December 8 this editorial considered the objection of another Virginia paper that the right of interposition had died at Appomattox.

A War and Three Amendments

The Norfolk *Virginian-Pilot*, in an editorial reprinted on this page today, agrees that a State's right of interposition, which doctrine has engaged us a good deal of late, does not lack for respectable origins. The trouble is, says our contemporary, that the doctrine "lacks some other things." Specifically, it is contended, an assertion of the right today would give no effect to the Civil War and the three amendments adopted thereafter.

We addressed ourselves to this objection briefly on November 23, but the point merits more extended treatment than could be accorded it then.

If it be true, as those who advance the argument avow, that the Civil War changed the fundamental nature of the Union, we should ask ourselves where in the present Constitution these changes are to be found. In the postwar period, what powers were delegated by the Constitution to the United States, and what were prohibited by the Constitution to the States?

It will be found that three changes only were made in the Constitution following the War for Southern Independence. These were the Thirteenth Amendment, which prohibited slavery; the Fourteenth, which provided that "No State shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"; and the Fifteenth, which said that the right of a citizen to vote "shall not be denied or abridged by the United States or by any State on account of race."

That is the total, the sum total, of all the constitutional changes that were made in the period immediately following the war. In what way, it may be inquired, did these changes alter the fundamental structure of the Union? And the answer, plainly, is in no way at all.

Had it been the intention of those who held power in the period of these amendments to establish the absolute supremacy of the Federal Government, surely they would have done a more workmanlike job. But no: The system for electing a President was left where? It remains to this day in the hands of electors who are to meet "in their respective States." If no candidate for the presidency is found to have a majority of the electors' votes, how is the election to be decided? The House of Representatives still is to choose by ballot, but in the balloting "the votes shall be taken by States." Nothing was done to alter Article V, which provides for amendment of the Constitution upon ratification "by the Legislatures of three-fourths of the several States." Not a comma was changed in the binding provision of the compact which spells it out that powers not delegated to the United States *by the Constitution*, nor prohibited *by it* to the States, are reserved to the States respectively, or to the people.

Examination of the Constitution, we would submit, fails utterly to disclose any

States' constitutional argument

changes in the compact wrought by the war that would delegate power to the Supreme Court in effect to amend the Constitution. That power clearly remains with the Legislatures of three-fourths of the States.

The *Virginian-Pilot* suggests, however, that if the Fourteenth Amendment itself has not changed since its ratification in 1868, the definition of the amendment's words and phrases has changed. But surely this is to accord the Supreme Court, *subject to no effective challenge or redress,* that remarkable arrogance of Humpty-Dumpty, to whom words meant just what he chose them to mean, and neither more nor less. If the word "equal" means "equal" on Monday, but means "same" on Tuesday, who is to know what "equal" will mean on Wednesday, or in what context? The contention here is that the court has not really *amended* the Constitution, it merely has *redefined* it, but the nice distinction is likely to be lost upon an entire region that abruptly has seen its whole tradition of public education gravely threatened.

Yet this needs to be said: The right of interposition, as we view it, does not *deny* the Supreme Court the power to interpret the Constitution or to suggest new meanings. All the right does is to empower the States to judge for themselves whether the court, in construing the Constitution, has remained within proper bounds or overstepped them. Year in and year out, it may be imagined that at least three-fourths of the States agree with the court's interpretations. By their silence, the States acquiesce in changes; by failing to interpose, the States in effect ratify the court's actions.

But it may be suggested, by way of analogy, that failure to exercise the right of impeaching a justice—which right has not been invoked in 150 years—does not mean that the right has been abandoned. So it is that the States, by failing to challenge the court's construction of the Constitution for nearly 100 years, have by no means abandoned the right—untouched by the war amendments—to interpose their sovereignty when at last they perceive a "deliberate, palpable and dangerous encroachment" upon their reserved powers.

If the existence of the right be denied, what it comes down to is this: That so long as one-fourth-of-the-States-plus-one are agreeable to the court's usurpation of power, three-fourths-of-the-States-minus-one are helpless. But manifestly, this is the very reverse of the fundamental principle of our Union that a minority is to be protected from the tyranny of a majority. It was for precisely this reason that the framers of the Constitution, recognizing the wide disparity of local interests and acknowledging the wisdom of leaving local matters in local hands, provided that the compact could not be amended unless *three-fourths* of the States agreed.

Those principles are just as applicable today as they were when the compact was formed, and no Reconstruction amendments or tricks of semantics can abridge them. What the court did in May, 1954, was in effect to *amend* the Constitution, by announcing that the States in 1868 had prohibited to themselves the power to operate separate schools—though the States had been operating separate schools for 80 years! What we are saying is that if the Constitution is to be so amended, the States themselves will have to amend it. And until the Constitution is so amended, we would contend that Virginia has no obligation *of right* to abide by the court's school decrees.

SCOTUS Amend Re Const

The whole of the editorial page of December 16 was devoted to interposition. The editorial below answered arguments raised by a pseudonymous correspondent. The remainder of the page was given to Governor Littleton Waller Tazewell's reply to Jackson's Proclamation of 1832, which follows.

Government by Caprice

In today's Forum, a gentleman who signs himself Caleb W. Loring rises to oppose the doctrine of "interposition." Plainly, the signature is pseudonymous. for our correspondent's arguments are taken largely verbatim from a book published by one Caleb William Loring in 1893; but that any reader should have taken the trouble to compos letter is in itself reason to his contentions as best we ca

Mr. Loring's position is th Webster and other apostles lute supremacy of the Fe ernment. The "compact the Union, he submits, has no val not the States, but "the p formed the Union. The Sta longer sovereign: They aban sovereignty long ago. Now, certain wholly local concern ishing of the theft of a pock chief) State sovereignty is a Mr. Loring finds it absurd State could practically put every law and act of the Gene ment it questioned." It is not e he submits, to say that this government by "caprice."

Very well, let us examine ments; and let us go first to t tion that by "We, the people *all* of the people collectively, coast to coast, the whole of tion. If ultimate sovereignty served, Mr. Loring has the be argument and we should bette editorial comment on the city to sage observations on the in of low morale in the Bureau of

We would persevere. For i ing's exposition properly sets nature of our Union, we would find this principle of mass s embodied in the whole of the Co If it were true that "the peo doned the sovereignty they under the Articles of Con which is to say, sovereignty through the respective Stat nothing would be spelled out m in a document so carefully com

At the very least, we would find this renunciation spelled more vital provisions of the Co The provisions (1) creating the tion and (2) providing for its an We may properly inquire, there created the Constitution? Wh the power to amend it or dissol

What do we find?

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> The ratification of the convention *States*

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Mr. Loring's position is that of Daniel Webster and other apostles of the absolute supremacy of the Federal Government. The "compact theory" of our Union, he submits, has no validity. It was not the States, but "the people" who formed the Union. The States are no longer sovereign: They abandoned their sovereignty long ago. Now, except for certain wholly local concerns (the punishing of the theft of a pocket handkerchief) State sovereignty is a nullity, and Mr. Loring finds it absurd that "every State could practically put its veto on every law and act of the General Government it questioned." It is not extravagant, he submits, to say that this would mean government by "caprice."

Very well, let us examine these arguments; and let us go first to the proposition that by "We, the people" is meant *all* of the people collectively, en masse, coast to coast, the whole of our population. If ultimate sovereignty is thus reserved, Mr. Loring has the better of the argument and we should better retreat to editorial comment on the city budget or to sage observations on the investigation of low morale in the Bureau of Police.

We would persevere. For if Mr. Loring's exposition properly sets forth the nature of our Union, we would expect to find this principle of mass sovereignty embodied in the whole of the Constitution. If it were true that "the people" abandoned the sovereignty they had held under the Articles of Confederation, which is to say, sovereignty exercised through the respective States, surely nothing would be spelled out more clearly in a document so carefully composed.

At the very least, we would expect to find this renunciation spelled out in the more vital provisions of the Constitution: The provisions (1) creating the Constitution and (2) providing for its amendment. We may properly inquire, therefore, who created the Constitution? Who retained the power to amend it or dissolve it?

What do we find?

In Article VII of the Constitution, it is spelled out that the fundamental compact creating this Union could become effective only upon

> The ratification of the conventions of nine *States*

and the Constitution so established would be established by whom? By the "people"? No, indeed. Ratification by the conventions of nine States was to be sufficient to establish the Constitution

> between *the States* so ratifying the same.

How was this instrument created? By "the people"? Again, no. The Constitution was

> Done in convention by the unanimous consent *of the States* present the 17th day of September in the year of our Lord 1787. . . .

Thus it may be observed that the *mass* of "people" neither wrote the Constitution or ratified it: The States consented, on behalf of *their* people, to the instrument; and the States, having created the General Government, breathed upon it the breath of ratification, and only then did it spring into existence.

The second point is equally clear. In Article V of the Constitution, it is spelled out that the compact may be amended in one fashion only. By the Supreme Court? Not at all. By "the people"? Again, no. The Constitution may be amended only when a proposed amendment is

> ratified by the Legislatures of three-fourths *of the several States*, or by conventions in three-fourths thereof.

If ours were absolutely a government of "the people," meaning the people as a whole, manifestly the people as a whole would choose the one officer who exercises, as an individual, the supreme executive powers. By this assumption, it may be supposed that in a country which numbers 65,000,000 adult voters, the candidate approved by 32,500,001 would become President, and the candidate acceptable only to 32,499,999 would be defeated. But plainly, the Constitution provides no such thing. Rather,

> Each *State* shall appoint, in such manner as the Legislature thereof may direct, a number of electors. . . .

and how are these electors to function?

> The electors shall meet *in their respective States*, and vote by ballot for President and Vice-President. . . .

and if no candidate for the presidency has a majority, what then?

> . . . from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot the President. But in choosing the President, the votes shall be taken *by States*, the representation from *each State* having one vote. . . .

Much more could be cited from the plain provisions of the Constitution. In almost every paragraph, the recurring theme asserts itself: These are sovereign

Continued

States, voluntarily surrendering a part of their powers to a national government they themselves are creating. But the powers so surrendered are limited; they are carefully circumscribed; one by one, these powers delegated to the national government are painstakingly enumerated. And lest there be any misunderstanding, it is firmly proclaimed that the powers not delegated by the Constitution to the United States, or prohibited by it to the States, are reserved to the States *respectively*, or to the people.

Now, if this Constitution was, as Article VII says it was, an instrument binding "between the States so ratifying the same," then it remains to this day an instrument binding not "people," but States. And though the people are, of course, citizens of the United States, they are also, simultaneously, "citizens of the State wherein they reside." In the effective exercise of their powers, the people act not as a mass of people, but as people *of the several States*. Unless words have lost all meaning, nothing, in our view, could be clearer than this.

From this fundamental principle, the response to Mr. Loring's arguments proceeds naturally: Because the Constitution was assented to "by the States," and is binding "between the States so ratifying the same," an infraction of the Constitution properly may be asserted not by "the people," meaning the mass of people, but rather by the people *of a State*. And the only fashion in which this can be asserted is by the Legislature of a State, which is responsible to the people of a State.

Is Court Supreme

Mr. Loring concedes, by implication, that infractions of the Constitution may be charged. He does not embrace the absolute infallibility of the Federal Government. But if an infraction is charged, he argues that only the Supreme Court may arbitrate the dispute. Because the court's jurisdiction extends to all *cases* arising under the Constitution, he contends that this jurisdiction extends to all controversies between the United States and an individual State, arising from contested powers.

But this is not what the Constitution says. On the contrary, precisely this proposal was made to the Convention in 1787, and was explicitly rejected. The great men who met at Philadelphia that Summer well recognized, if Mr. Loring does not, that the Federal Government is not a *party* to the compact that is binding "between the States so ratifying the same." The Supreme Court, as a part of the Federal Government, is the creation of the parties. To accord it final and absolute powers for settling disputes between the Federal Government and a State would be to place the creature over the creator. As we see it, only the parties to the Constitution, which is to say, only the States, are qualified to resolve an issue of contested power once such an issue is raised.

Mr. Loring is horrified at this concept. He refers to "the viciousness of this doctrine of nullification," and condemns as "impracticable" a system by which a State could "nullify judicial proceedings at its caprice."

But let us turn the argument around: What could be more vicious, it may be inquired, than a procedure by which nine unresponsible men, appointed to the Supreme Court for life, may shape the Constitution to suit themselves, subject to no effective check by anyone? What could be more capricious than the decision of a court that reads five textbooks in sociology and overthrows a construction of the Constitution by which a dozen States had operated their public institutions for more than 80 years? What could be more capricious than a court that reverses itself 36 times in 18 years? What is to be said for the remark of a member of the court, Mr. Justice Roberts, that opinions had come to resemble Pullman tickets—good for this day and trip only? Let us talk no more of "caprice."

No 'Chaos' Foreseen

This same objection was raised long ago. Webster contended that only chaos could result if each State were permitted to judge for itself of Federal infractions of the Constitution. But the answer given by Jefferson, Madison and others was that the apprehended "chaos" was more apparent than real. Once the Federal Government were made to realize that its actions must have the approval of at least three-fourths of the States (which surely is the plain intention of the Constitution), the Federal Government could be expected to move circumspectly, within the fixed limits of the Constitution. The States, for their part, meeting prudence with prudence, would interpose their sovereignty only in the most "grave and extraordinary" cases, when a "deliberate, palpable and dangerous" encroachment appeared to affect their most vital principles.

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NORFOLK, January

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Mr. Loring's arguments, far from persuading us to retreat to the mundane fields of councilmanic ordinances and the grievances of the police, serve rather to buttress our convictions: The right of a State to interpose its sovereignty exists today as it always has existed, as a final check-and-balance against gross encroachments of the Federal Government upon reserved powers of the States. And if the right has lain quiescent for some 95 years, this long dormancy offers all the more compelling reason to revive the doctrine now, in a day when all powers of the States are threatened with imminent destruction.

Letter from Littleton Waller Tazewell

In November of 1832, South Carolina adopted strong resolutions of nullification, aimed at preventing collection of Federal tariffs. To this action, President Jackson responded on December 10 with a proclamation denying South Carolina's right to interpose its sovereignty against the Federal Government.

Here in Virginia, Littleton Waller Tazewell, who was to become Governor in 1834, undertook a review of Jackson's proclamation. In a series of 13 letters to the Norfolk and Portsmouth Herald, *beginning on December 28 and running intermittently through the following January 30, he demolished Jackson's arguments one by one. These letters subsequently were published (in 1888) by J. D. Ghiselin in Norfolk.*

In his twelfth letter, Governor Tazewell (who had signed himself only "A Virginian") took up the prospect of encroachment by the Federal judiciary upon powers reserved to the States. His views are as cogent today as they were 123 years ago. An excerpt from this letter follows.
EDITOR.

ANDREW JACKSON

• • • •

NORFOLK, January 25, 1833.

...But there is one (suggestion) which has not yet been presented, and to the examination of this, I propose to dedicate this number.

This objection is, that no State may rightfully assume as a fact, that the Covenant [Constitution] has been broken by any of its co-States, or act upon such an assumption, without violating its own faith: because the Covenant itself has provided an arbiter to decide all such questions, by whose decisions the faith of all the parties must be bound. This arbiter is said to be the Supreme Court of the United States.

To this objection, which is founded upon the supposed existence of a common arbiter, authorized and capable to decide all infractions of the Constitution, of which any State may have cause to complain, many answers may be given, all equally conclusive to shew, that no such arbiter, clothed with such authority, either does, or ought to be expected to exist.

THE FIRST OF these answers is, that according to no legal possibility, could the case supposed to exist, ever be presented to the Supreme Court for its decision, even if the sovereign parties were content to abide by that decision. The judges of the Supreme Court, like all other judges, are appointed to decide "cases," and not to amuse themselves or to edify mankind (as the President seeks to do in this Proclamation), with obiter dicta, or with public Lectures, communicating the results of their lucubrations upon mere questions of law, of politics, or of any other art or Science. These cases, too, according to the very terms of the Constitution, must be "cases in law and equity," and we have the authority of this court itself, for saying that there cannot exist any case in law or equity, but one presented to a Court by the representations of parties. . . .

Now, the case supposed to exist, is the case of a Covenant of Union, believed by one of the parties to be violated by the government of the United States, the agent of all the parties. . . .

[Tazewell then discussed several forms in which the evil of encroachment might appear, and went on to consider the possibility that the infraction which provokes State interposition may be an act of the Judiciary itself. His argument continues].

Here it would be monstrous to refer to the Judiciary to decide whether the Judiciary itself had done right; and yet the objection applies equally to all cases.

Another answer is, that in this government, composed as it is of coördinate departments, there exists no reason why more respect should be paid to the acts of one of these departments, than to those of any other; and if it is admitted, that neither of these departments is bound by

the act of its coördinate, it would be strange indeed to say, that the sovereign of all was bound by such an act. Now, the objection itself asserts, that the Judiciary is not bound by the acts of the Legislature or of the Executive; and no one, it is believed, will contend that either of the other departments is bound by the Judgements of the Judiciary, however obligatory these may be upon the parties.

I speak not of courtesy and respect, but of obligation merely. Should the Judiciary declare an act of the Legislature void, such a declaration, as I have already said, cannot repeal the law, although it may prevent its application to the particular case sub Judice. Congress may establish other Courts or other Judges to execute the law; or the President and Senate, in execution of such laws, may appoint additional Judges of the Supreme Court, who may differ from their associates and over-rule the past decision in the first new case, that comes before the Court. Nay, the House of Representatives may impeach and the Senate condemn the Judges, for this very decision given in violation of the law enacted by them.

I do not mean to say, that any of these things would be right; but when reasoning upon the case of a violated Constitution, I have a right to suppose that all legal means would be employed by the violators to make their violation effectual; and so to prove, that the Judiciary cannot bind the Legislature. We have the authority of the President himself for saying that he feels himself as much bound by his oath to support the Constitution as any one else can be; and therefore, if his agency is required, whether by the Legislature or the Judiciary, to do any act which he believes unconstitutional, he will not be made to sin against his own conscience and to violate his oath.

His new partisans used to censure him bitterly for this assertion: but yet he never made one more moral, legal, or constitutional than it is. This is a government of concurring powers, its departments are all coördinates, nor can any one of them move far in any direction, without encountering its fellow, by whose concurrence alone, it may proceed in that way....

BUT LASTLY, can the human mind conceive a more audacious proposition, than that which suggests, that in a controversy between the parties to a Covenant, by which covenant an agent is created, where the matter in dispute between the principals regards the authority exerted by the agent, the decision of this controversy must be referred to the agent himself?

The very exertion of the authority by the agent is a decision that he believes he may rightfully do so; and after this, it is gravely proposed, to leave the matter to the final arbitrament of one who has already decided it, and who has decided it, too, with the approbation of the very persons who proposed such a reference.

In transactions between man and man, none could hesitate what name to bestow upon such a proposition: but where the Sovereignty of the States and the freedom of their people is concerned, a gross fraud is metamorphosed into a political theory only. Nor will the case be changed materially if the nominated arbiter has never yet decided the question, provided that arbiter be the Supreme Court; this arbiter is not even given by lot. It is appointed by the supposed wrong doer, paid by him, accountable to him, subject at any moment to be punished and cashiered by him, and this too, for giving the very decision its conscience might prompt. Thus, matters which would constitute valid and legal objections, to witnesses, to Jurors, and to the Judges themselves, in the most trifling controversy between man and man, are to be overlooked and disregarded, in the support of a new theory, which seeks to constitute the Federal government the sole Judge of its own power.

I HAVE GREAT respect for the Judiciary of every country, but no lawyer or historian can tell, in what age or in what country, the Judiciary have ever been able, even where it was willing, to protect the rights of the people against the usurpations of Government. England has long been blessed with a Judiciary, composed of men, whose intelligence, whose integrity, and whose firmness, would not suffer in comparison with that of any others who have ever been or are now on earth. But when or who of these Judges have ever been able to save the privileges of the people from the perogatives of the crown, unless the Judiciary was sustained by another branch of the government? And how many examples are there, of acts of Parliament made for the special purpose of saving the people from the Judiciary?

For the Judiciary of the United States, I entertain at least as much respect as I do for any other Judiciary. I will not say more; and I cannot say less. With the individual Judges, I have nothing to do. They shall all be, if any one thinks so, what some of them certainly are, "like Mansfield wise, and as old Foster just." But all must know that the robes of office do not cover angels, but mere men, as prone to err, as any other men of equal intelligence, of equal purity, and of equal constancy.

We all know, too, that some of the supreme Judges of the United States, have not thought it unbecoming their high places to accept Foreign Missions, to present themselves as candidates for other offices, and to enter into newspaper disquisitions upon party topics. I do not mean to blame them for such things, but merely to shew from such facts, that the rights of sovereign States, when assailed by the government of the United States, could not be safely confided to a forum so constituted, even if it was possible that it could take cognizance of the subject. Nor can he be considered as a discreet friend to the Judiciary, I should think, who desired to embark it in this fearful strife.

I have answered this first objection, founded upon the suggestion that the Supreme Court of the United States is the common arbiter appointed to decide all questions that may arise between a State and its co-States, touching the violation of their mutual covenant. My answer to the remaining objections I must postpone to another number.

A VIRGINIAN.

Interest in interposition grew Christmas season. Thousands torials" were distributed u passed and the campaign res of Locke." They merit close r

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There was a time, in the of the Republic, when the co "letter to the editor" ranke higher political and literar reread the *Federalist* essays anew that almost all of the lished in the Winter of 1787- letters to the New York pre signature of "Publius." To in the period of the 1820s an find delight in pseudonym from a "Cato," a "Brutus," geddon." There were, as the giants in those days.

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Interest in interposition grew at an astonishing pace during the Christmas season. Thousands of copies of the "interposition editorials" were distributed upon readers' requests. Christmas passed and the campaign resumed on December 26 with "letters of Locke." They merit close reading.

When 'Locke' Took Pen in Hand

There was a time, in the earlier days of the Republic, when the composing of a "letter to the editor" ranked among the higher political and literary arts. To reread the *Federalist* essays is to marvel anew that almost all of them were published in the Winter of 1787-88 simply as letters to the New York press, over the signature of "Publius." To go ahunting in the period of the 1820s and 1830s is to find delight in pseudonymous letters from a "Cato," a "Brutus," an "Armageddon." There were, as the saying goes, giants in those days.

We carried an excerpt from one such letter on December 16—a portion of a letter written by Governor Littleton Waller Tazewell to the *Norfolk & Portsmouth Herald* in January of 1833 over the signature of "A Virginian." Today we begin a series of excerpts from letters written in February, 1833, to the *Richmond Whig* over the signature of "Locke." Because these letters constituted an attack upon Thomas Ritchie, editor of the competing *Richmond Enquirer*, we have added a salutation to Mr. Ritchie for clarity's sake. Otherwise, no change has been made.

Even on the day after Christmas, when it is commonly believed that all good Virginians are so surfeited with ham, eggnog and little children's voices that heavy reading will find no takers, we believe "Locke's" letter merits publication. The correspondence is attributed to Abel Parker Upshur, one of the most remarkable Virginians of a remarkable day. A native of Northampton County, he practiced law for a time in Richmond, sat in the Constitutional Convention of 1829-30, and served from 1826 to 1841 on the Virginia Supreme Court. After two years as Secretary of the Navy, he succeeded Webster in 1843 as Secretary of State. He was among those killed in an explosion aboard the battleship *Princeton* in 1844.

The fact that Upshur's own political philosophy so closely followed that of John Locke, plus the fact that his position as a member of the Virginia Supreme Court would suggest a strict anonymity, tends to support attribution of the letters to him. But regardless of the author's identity, these letters are first-rate contributions to an understanding of "interposition."

Notice the process of reasoning here employed: Should it be assumed, Locke inquires, that revolution is the *only* recourse against usurpation of power by government? Or is it not self-evident, if ours is a perfect Union, that some more peaceful, orderly measure of redress against encroachments is available to the States and to the people? It cannot be expected that our dual government will operate with the divine perfection of the planets, each rotating exquisitely in its own undeviating orbit, but rather that errors will be made and that government will stray from its defined path. Surely, it is argued, revolution and secession offer no satisfactory measures of *correction;* the most perfect surgery has no value if it kills the patient. What, then? And specifically, what is the rightful remedy if the Federal government unconstitutionally encroaches upon the reserved powers of the States?

Locke's answer to usurpation in the 1830s (and ours, in a different situation in the 1950s) is for a State to interpose its sovereignty against the encroachment, in order to arrest the progress of the evil and to obtain an orderly determination of a question of contested power.

But we will not trespass further on his presentation. In the excerpts from these letters to Mr. Ritchie that will appear today, tomorrow and Wednesday, Virginians will encounter a lively mind at work; and we hope many readers will agree that arguments which are applicable to an unconstitutional *act of Congress* are doubly applicable to an unconstitutional *order of the Supreme Court.*

May we address ourselves, instead, to a question raised by a reader who objects to the current proposal for a "negative" amendment to the Constitution. We would respond that the constitutional issue raised by Southern States can be settled in no other way.

The theory of government under which we are proceeding is that sovereignty still resides in the people of the several States; it is they who grant powers to

Continued

the Federal Government, not the Federal Government who grants powers to them. The only manner in which a given power constitutionally can be prohibited to the States is by amendment of the Constitution. Now, we believe that the power to operate racially separate public institutions is among those powers that never have been prohibited by the Constitution to the States. And if this power is now to be prohibited to the States, we believe that only the States—and not the Supreme Court, acting alone—constitutionally can accomplish that end.

Therefore, the sole procedure by which the issue constitutionally may be resolved is for the States to act upon an amendment proposing not that the power be granted (for we already have the power), but proposing rather that, as States, we mutually prohibit it to ourselves. If three-fourths of the States ratify such an amendment, thereby affirming the Supreme Court's action, so be it; but if the South can hold 13 States against the proposed amendment, we believe such a rebuke to the court would plainly disclose the despotic nature of its mandate.

Locke's First Letter to Mr. Ritchie

Editor's Note:

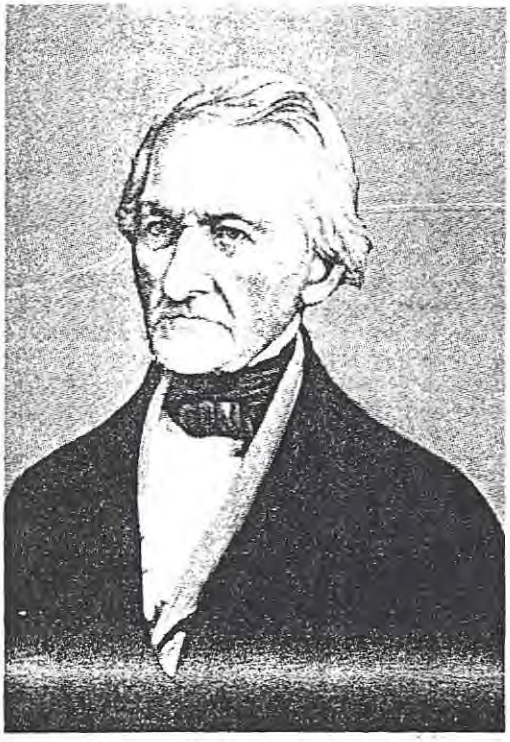
South Carolina's assertion of Nullification in November, 1832, stirred up enormous controversy across the Union. Thomas Rtichie, editor of the Richmond Enquirer, strongly advocated State Rights, but he stopped short of espousing Nullification. Impatient with his position. an anonymous correspondent (thought to have been Abel Parker Upshur) addressed to him, through the columns of the Richmond Whig, a series of six letters in February, 1833. If one reads these letters by "Locke" today, substituting for the phrase "act of Congress" the phrase "decree of the Supreme Court," the applicability of his argument to the current movement for interposition will be evident.

THOMAS RITCHIE, ESQ., EDITOR,
THE RICHMOND ENQUIRER

. . . It is true, that you have, on more occasions than one, professed to give us your political faith, and so far as your abstract principles are concerned, we have, perhaps, but little reason to complain of you. But you have dealt with us too much in generalities. It is not enough that you should profess yourself a Friend of State rights. We are all of us friendly not only to *State* rights, but to every other right which we are willing to acknowledge as such.

But you have not yet told us, with sufficient clearness, *what these State rights are.* We can no longer satisfy ourselves with abstractions in principle, or speculations in reasoning. The time for action has arrived . . . It is time for us to know, not only that we have rights, but also, in what those rights consist, and in what manner they may be asserted.

You have taken a strong and decided stand against the doctrine of Nullification; nay, you can scarcely speak of it in any other language than that of contempt and derision. But you have not, so far as I recollect, favored your readers with any detailed argument upon that subject: Neither have you distinctly told us what alternative you propose . . .



THOMAS RITCHIE

Permit me, then, as a citizen neither very young nor wholly unconnected; as one who considers everything which he cherishes in our institutions in the most imminent peril; as one who sincerely believes that you can form the public mind of Virginia, and that Virginia can control the destinies of this once happy Union, to entreat you to answer explicitly the following interrogatories.

They are propounded, not in the spirit of a controversialist, but with a deep conviction that they involve the only principles upon which the rights of the States can be maint course the only security against a and essentially monarchical gover

1. Is there, or is there not, in the Constitution of the Unite which the States may resist the the Federal Government; or are tions to be resisted only by revolut

2. If there be no such prin the Federal Government as unli powers as any other government, its form, whose encroachments up of the citizen can be repelled only or other application of physical fo

If you believe, as I am sure yc that there *is* such conservative pri Constitution, then I beg the favc point it out, and tell us in what ma render it available. In doing this, answer—

3. Is not the passing a law which the Constitution does not usurpation on the part of that b not every such unconstitutional la void, as passed by a delegated a yond the limits of that authority?

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5. If the States are not so b mit, is not the particular State w to submit, right in so doing?

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10. If there be, does the appea other authority than the other par Constitution?

11. Who are these "other par States or the people?

Upon this last question, you so fully committed, that it is impossil your answer. I have, therefore, to a

12. Is not the decision of eve tribunal of competent jurisdiction, and conclusive, until it is reversed? is not the decision of a State upon tional question on which it has a cide, conclusive as to such State, ur versed by the other States acting

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Mr. Ritchie

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1. Is there, or is there not, any principle in the Constitution of the United States, by which the States may resist the usurpation of the Federal Government; or are such usurpations to be resisted only by revolution?

2. If there be no such principle, is not the Federal Government as unlimited in its powers as any other government, whatever be its form, whose encroachments upon the rights of the citizen can be repelled only by rebellion, or other application of physical force?

If you believe, as I am sure you do believe, that there is such conservative principle in the Constitution, then I beg the favor of you to point it out, and tell us in what manner we may render it available. In doing this, be pleased to answer—

3. Is not the passing a law by Congress which the Constitution does not authorize a usurpation on the part of that body? And is not every such unconstitutional law absolutely void, as passed by a delegated authority, beyond the limits of that authority?

4. Are the States bound to submit to laws which are unconstitutional, and therefore void?

5. If the States are not so bound to submit, is not the particular State which refuses to submit, right in so doing?

6. If the recusant State be right in her refusal to submit, are not the other States wrong in compelling her to submit? Is it not oppression of the worst sort, to coerce obedience to usurped power?

The above questions are propounded upon the hypothesis that Congress may have actually passed a law palpably and dangerously violating the Constitution. And now be pleased to tell us in what manner the fact of such palpable and dangerous violation is to be ascertained? In doing this, be also pleased to answer—

7. Is there any common umpire established by the Constitution, to whom may be referred questions touching a breach thereof?

If there be such a c o m m o n umpire, be pleased to point it out.

8. If there be no such common umpire, does it not result from the necessity of the case, that each State must judge thereof for itself?

9. If a State, in the actual exercise of this right, should decide that any given act of Congress is a palpable and dangerous violation of the Constitution, is there any right of appeal from that decision?

10. If there be, does the appeal lie to any other authority than the other parties to the Constitution?

11. Who are these "other parties"? The States or the people?

Upon this last question, you are already so fully committed, that it is impossible to doubt your answer. I have, therefore, to ask you—

12. Is not the decision of every inferior tribunal of competent jurisdiction, obligatory and conclusive, until it is reversed? And if so, is not the decision of a State upon a Constitutional question on which it has a *right* to decide, conclusive as to such State, until it is reversed by the other States acting as such?

13. If it be thus conclusive, has the State a right to *act* upon its decision or not?

14. If it has no such right of action, is its right of judgment any thing more than a mere liberty of speech and of opinion, and therefore, no *available* right at all?

15. If it *has* such right of action, is it to act by *submitting* to the usurped power, or by opposing it?

A man of your spirit can give but one answer to this question. Then be good enough to tell us in *what manner* this opposition is to be made? In doing this, be pleased to answer—

16. Are petition, remonstrance and protest anything more than appeals to the oppressor, and therefore in no sense, to be called *opposition* to him? Or if it be opposition, and these petitions, remonstrances, and appeals, should all be disregarded, is the matter to rest there?

17. If not, and farther resistance is to be made, ought not that resistance to be made in such form as to *redress the wrong*?

18. If so, can the wrong be redressed by the injured State going out of the Union? Does not this, on the contrary, *increase* the wrong as to her, by compelling her to relinquish all the advantages of the Union, to which she is fairly entitled, and at the same time, encourage the aggressors to persevere in the wrong, by withdrawing all opposition to them? Is not the "redress," in this mode of seeking it, merely an additional wrong done to the injured party?

19. If so, what do you propose to substitute for it?

You perceive, sir, that I have, in all these questions, followed very closely, the Virginia Resolutions and Madison's Report. They are the texts upon which my future commentaries will be offered.

I have done so on purpose, for you have always been an advocate of those documents, as being clearly orthodox; and as I entertain the same opinion of them myself, I am unfeignedly desirous to see by what process of reasoning, any two men of tolerable intellect, can be led to different conclusions upon such premises.

I confess that it seems to me exceedingly clear, that our Constitution is most worthless and tyrannical, if the usurpations of those who administer it cannot be resisted by any means short of revolution. I have always considered the reserved powers of the States, as the only real check upon the powers of the Federal Government; and I have always considered it, not only the right, but the imperious duty of the States, so to apply that check, as not to dissolve the Union.

And I have never been able to discover any mode of doing this, except by the positive refusal of the States to submit to usurpations, whilst, at the same time, remaining in the Union, they force the Federal Government back within the charter of its power. This seems to me an irresistible inference, from the principles indicated in the preceding interrogatories.

Perhaps you can show me that these principles do not lead to Nullification? I shall be happy to be undeceived; but at present, I entertain no doubt, that that doctrine is the only one upon which the States can safely repose . . .

February, 1833. "LOCKE."

A Second Letter to Mr. Ritchie

EDITOR'S NOTE:

In his second letter of February, 1833, to The Richmond Whig, a correspondent who signed himself "Locke," analyzed the Virginia Resolution of 1798 with a view toward discussing the various modes in which a State might resist encroachment of the Federal government upon her powers. The object, he said, should be to find some method of resistance "which will preserve the Union unimpaired, while it will effectually put down the usurped power."

Mere petition, remonstrance or protest, he continued, would be meaningless; an appeal to arms "is utterly against all notions of constitutional remedy"; an appeal to the Congress to repeal an unconstitutional law (and by extension, an appeal to the Supreme Court to reverse its own unconstitutional decree) would accomplish nothing, for "it is not likely that the usurper will either acknowledge his ursurpation, or lay down his usurped power." Secession from the Union would not be a measure resisting the progress of the evil, but rather would be a "running away from the oppressor."

The Whig's anonymous correspondent (believed to have been Abel Parker Upshur) concluded that no mode of resistance could accomplish the desired end, save Nullification. In his third letter, an excerpt from which follows, he amplified this theme.

THOMAS RITCHIE, ESQ.,
EDITOR, THE RICHMOND ENQUIRER.

I am now to prove to you, sir, that Nullification is the only mode in which the usurpations of the Federal government may be resisted by the States in accordance with the principles of our resolutions of 1798 . . . Perhaps our best course of proceeding will be to state [the principles] in detail, and see whether nullification does or does not conform to them.

1. The resolutions assert that there is some mode *within* the Constitution by which the usurpations ofthe Federal government may be resisted by the States. Now, it is true that nullification is denied to be a constitutional remedy; but the nullifiers insist that it *is* constitutional; and I mention the point only to show that they do not *intend* to assert any extra-constitutional or revolutionary remedy — and that so far, at least, they are within the resolutions of 1798. Whether their remedy is constitutional or not, supposing the principles of the resolutions to be so, must depend on its conformity with those principles in the subsequent propositions. We remark, therefore, that

2. The remedy must be such as to *"arrest* the progress of the *evil."* Now, be pleased to bear in mind that nullification does not proceed upon any supposed right of the State *to repeal a constitutional law,* but upon the right of a State *to declare that an unconstitutional law really is so, and to refuse obedience to it for that reason.* I beg of you to bear this distinction in mind. If nullification proposes any thing more or less than this, I am no nullifier, and do not understand the doctrine . . .

It appears, then, that the *principles* upon which nullification proceeds are (in the abstract) in strict conformity with those of the resolutions of 1798. But those principles, it is admitted, must be limited and qualified by the object in view. We are, then, to inquire whether nullification does, or does not, "arrest the progress of the evil."

The evil is the exercise of an usurped power: nullification declares that the usurped power shall no longer be obeyed. Is not this the best of all possible modes, if not the *only* mode, in which it can be "arrested?"

Perhaps it is not too great a refinement to say, that the "arrest" here contemplated, is of the ursurpation only, and not of the usurping power. In other words, it is not designed to put down the Federal government—nor embarrass nor impede its legitimate operations; but simply to prevent it from exercising a power which does not belong to it . . . Its operations *within* the Constitution must all go on as before, whilst its operations beyond the Constitution must be "arrested."

Now, this is precisely and peculiarly the effect of nullification. And, strange to tell, it is on this very ground that you and others have most strongly assailed that doctrine. You all say, that it is absurd to pretend that a State can be *in* the Union and *out* of the Union at the same time; and that it is monstrous in a State to contend for all the advantages of the Union, as to certain laws, while she refuses to submit to the burthens imposed by other laws.

Nothing in nature can be more perfectly self-evident than all this . . . Remember, sir, that a law *beyond* the Constitution is is *no law at all,* and there is no right anywhere to enforce it. A State which refuses to submit to such a pretended law, is strictly *within* the Union—because she is *in strict obedience to the Constitution;* and it is strange to say that she "refuses to submit to the burthens" imposed by any law which is *not law at all.*

There, then, you have a picture of Nullification. It secures to the State the right to remain in the Union and to enjoy all the advantages which the Constitution and laws rightfully enjoin; while it "arrests the progress" of usurped power, by destroying the obligation of every pretended law which the Constitution does not authorize, and which, therefore, is not law. If this is not the meaning of the resolutions of 1798, I have much misunderstood them . . .

It has not escaped my attention that, according to these resolutions, the State interposition which they contemplate is not authorized, except in cases of "deliberate, palpable and dangerous exercise of powers not granted." It will be obvious, however, to intellects less clear than your own, that this does not affect, in any degree, the principle upon which State resistance is justified, nor even the mode in which

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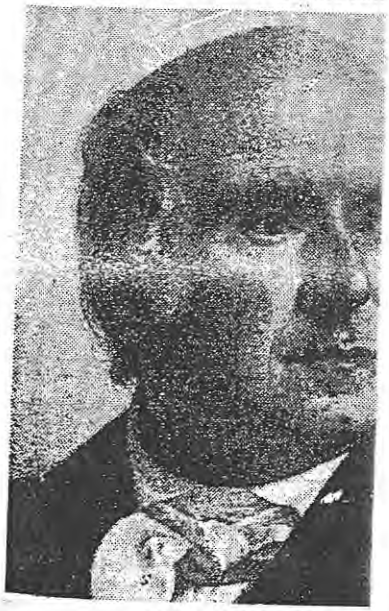

ABEL PARKER UPSHUR

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EDITOR'S NOTE: *In his fourth letter to The Whig, an excerpt from which will appear tomorrow, "Locke" examined and approved the procedure now being advocated for interposition by Southern States against the Supreme Court—that is, a suspension of enforcement of the school segregation decree until its constitutionality shall have been affirmed by at least three-fourths of the States, pursuant to Article V of the Constitution.*

A Final Letter to Mr. Ritchie

EDITOR'S NOTE:

In February of 1833, a distinguished Virginian, thought to have been Abel Parker Upshur, then a member of the State Supreme Court, addressed a series of letters to Thomas Ritchie, editor of the Richmond Enquirer. Published in the competing Richmond Whig, over the pseudonymous signature of "Locke," these letters expounded the doctrine of interposition as South Carolina was then asserting it.

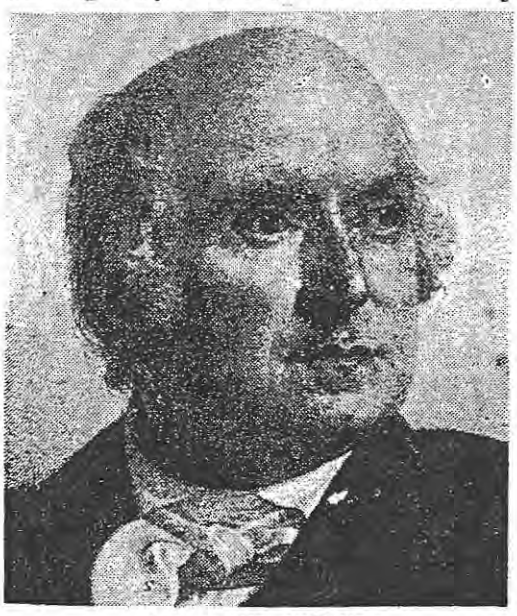
Because of the applicability of his reasoning to the crisis before the South today, when Virginia is concerned not with an unconstitutional act of Congress but more significantly with an unconstitutional decree of the Supreme Court, The News Leader has undertaken to reprint excerpts from these letters to Mr. Ritchie. Students of government, we believe, will find them intensely interesting.

A concluding portion of Locke's letter follows.

THOMAS RITCHIE, ESQ., EDITOR,
THE RICHMOND ENQUIRER.

In my last letter, sir, I submitted for your solution, a proposition which appears to me to place you in considerable difficulty. . . .

You will perhaps say, that although a State has a right to pronounce on the constitutionality



ABEL PARKER UPSHUR

of an act of Congress, yet it is, nevertheless, bound to submit to an act so pronounced to be unconstitutional until the other States shall have sanctioned its decision. I will endeavor to show . . . that the Resolutions of 1798, so far from countenancing that idea, do distinctly assert the precise reverse.

I presume it will readily be admitted, that Madison's Report, which was made expressly to sustain those Resolutions, is a fair interpreter of their meaning. That Report, after stating the proposition that "where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the judges, in the last resort, whether the bargain made has been pursued or violated," proceeds thus:

> The States, then being the parties to the Constitutional Compact, and in their sovereign capacity, it follows, of necessity, that there can be no tribunal above their authority, to decide, in the last resort, whether the Compact made by them be violated; and, consequently, that as the parties to it, they must decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.
>
> From this view of the Resolution, it would seem inconceivable that it can incur any just disapprobation from those who, laying aside all momentary impressions, and recollecting the genuine source and object of the Federal Constitution, shall candidly and accurately interpret the meaning of the General Assembly. If the deliberate exercise of dangerous powers, palpably withheld by the Constitution, could not justify the parties to it, in interposing, even so far as to avert the progress of the evil, and thereby to preserve the Constitution itself, as well as to provide for the safety of the parties to it, there would be an end of all relief from usurped power, and a direct subversion of the rights specified or recognized under all the State Constitutions, as well as a plain denial of the fundamental principle on which our independence itself was declared.

This language appears to me plain enough for any common understanding. It even goes a bow-shot beyond the Nullification of South Carolina. That State admits that the other States, acting as such, may overrule her decision; but the Resolutions, as explained by the Report, contemplate such decision as "in the last resort," and therefore, final and conclusive.

This must be the correct interpretation, unless the Report, by the term "States" and "parties," intended to limit itself to the plural number, and, of course, not to include a single State acting by itself. This is, at least, a mere quibble, altogether unworthy of the dignity of

Continued

the subject. . . . It is idle to suppose that the interposition either of all the States, or of a majority of them, is intended to be asserted as a right, when the object is to correct the usurpations of the very majority itself. Certainly those who do the wrong, not only have a *right* to redress it, but are in *duty bound* to do so.

Do the Resolutions, then, contemplate a plural number of less than a majority? If so, a single State may act for itself, upon the same principle; for there is no rule either in ethics or politics, which measures the rights of a minority by the mere number who may happen to compose it. Indeed, that the action by a single State, for itself, was contemplated, is manifest enough, from other considerations. . . . A case may very well arise, in which an unconstitutional law may affect the rights of a single State only; and it would be a mocking of the very name of State Rights to say that in such case, she may not protect herself. If this be the meaning of the Resolutions, so far from affirming and protecting State Rights, they affirm that no single State has any rights at all.

Besides, the Resolutions speak only of the reserved rights of the States; among which reserved rights, is that which authorizes State interposition, to arrest the usurpations of the Federal Government.

Now, how are these rights "reserved"? Does one State "reserve" its own rights to another State, or any number of other States? This seems to me, to be a grant, and not a reservation of a right. Each State, then, reserves its own rights to itself, and the Resolutions affirm, that the right to refuse obedience to an unconstitutional law, is among these reserved rights.

Again: If the State may not act upon its own decision, until the majority have sanctioned it, the right so to decide, is, as to all practical results, in that majority, and not in the State. The State has only the right to express its opinion; which opinion, although involving her "safety," and her very existence, goes for nothing, until approved by others. This is, indeed, a meager State Right, Mr. Ritchie.

Besides, sir, is there not some contradiction in the positions that a State may declare a law to be unconstitutional, and yet that it is bound to submit to that law for some given time? What difference is there, in principle, between an obligation to submit to an unconstitutional law for one day, and an obligation to submit to it for one year, or forever, I confess that I can see none at all.

Finally, sir, suppose that the other States should refuse to say whether the particular State which undertakes to pronounce a law unconstitutional, is right or wrong? There are no means of compelling them to decide, and of course, a majority of the States have only to stand mute, in order to deprive all the other States, and constitutionally too, of every right which appertains to them. Nay, even if the other States should be disposed to act upon the subject in good faith, the right which the individual States interposes to protect, may be such as to be lost forever, unless it is promptly asserted. . . .

It is perfectly true, as the President [Jackson] contends, that if a State may declare *one* law unconstitutional, it may declare *any* and *every* other law to be so; and by the same rule, each State may, in the exercise of the same right, select a particular law or laws as unconstitutional, and destroy the uniform operation of the system. But while this is certainly *possible*, it is in no degree *probable*, and cannot possibly occur, except in such a state of public feeling in regard to the Union, as would at all events, dissolve it by other means.

In practice, therefore, this argument of the President is not entitled to any consideration. And even if it were otherwise, is it more consistent with principle that the agent should control the constituent, or that the constituent should control the agent? . . . Human sagacity cannot foresee, nor human prudence provide for all possible contingencies; nor can human language define and limit every possible modification of social rights. Although Governments are primarily founded in distrust, yet there is, of necessity, some degree of confidence in all of them. The wisest statesman can do no more than repose that confidence in the safest hands, while at the same time, he surrounds it with all practicable safeguards against abuse. If the States may abuse their reserved rights in the manner contemplated by the President, the Federal Government, on the other hand, may abuse its delegated rights. There is danger from *both* sides, and as we are compelled to confide in the one or the other, we have only to inquire, which is most worthy of our confidence.

It is much more probable that the Federal Government will abuse its power than that the States will abuse theirs. And if we suppose a case of actual abuse on either hand, it will not be difficult to decide which is the greater evil.

If a State should abuse its right of interposition by arresting the operation of a constitutional law, the worst that could come of it would be to suspend the operation of the law for a time, as to that State, while it would have all its effects within the other States. This would certainly be unjust, but in most cases, would be attended with very little practical evil.

Besides, according to the doctrine for which I am contending, this evil would be temporary only; it must cease in some way or other, as soon as the other States act upon the subject. I acknowledge however, that it is at best an evil, but it is an evil inseparable from our system, and one which cannot be avoided except by submitting to a greater evil.

It is perfectly evident that this right must exist in the States unless it be incompatible with the rights of the Federal Government. Supposing this incompatibility to exist, there must be a right in that Government to control the States in this respect, and to enforce a law which the States may have pronounced to be unconstitutional. Let us now suppose an abuse of *this* right. It would consist in an attempt by the Federal Government, *to coerce obedience to an unconstitutional law.* This, sir, it seems to me, is *despotism in its very essence.*

If the Federal Government may enforce *one* unconstitutional law, it may enforce *every* unconstitutional law, and thus all the rights of the States and the people may fall one by one, before the omnipotence of that Government. . . .

"LOCKE."

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ederal Government may enforce tutional law, it may enforce *every* nal law, and thus all the rights of d the people may fall one by one, nnipotence of that Government. . . .

"LOCKE."

December 30, 1955

'Interposition' Gains Momentum

It is a heartwarming experience to see the movement toward State interposition gaining adherents across the South. This newspaper had not dreamed, when we began a series of editorials on November 21, that little more than a month later this historic concept of State sovereignty would have won so wide an endorsement. Now the idea has been taken up by Governor Timmerman in South Carolina; by Senator Eastland, Governor-elect Coleman and others in Mississippi; by Attorney-General Eugene Cook, in Georgia, and by key members of the State Legislatures of Louisiana, Arkansas and Alabama.

These gentlemen have grasped instantly the great hope for restoration of Constitutional process that lies in a reassertion of the doctrine Madison and Jefferson espoused so long ago. They have recognized that school segregation, however critical a problem it may be right now, is not the overriding problem. The transcendent issue lies in finding some *effective* check upon encroachments by the Federal judiciary upon the reserved powers of the States.

What all of us who have interested ourselves in this movement have come suddenly to recognize is that the Supreme Court alone, of all agencies of our State and Federal governments, operates subject to no efefctive check whatever. A President can be checked by the Congress or the courts; a Congress can be checked by presidential veto or by court decree; the State governments similarly function in well circumscribed spheres.

It never could have been intended that nine men, appointed for life, should be permitted to exercise *sole* authority, subject to no challenge, to take from the States their reserved powers or to grant to the Federal government powers it never had before. The right to delegate powers to the Federal government, or to reserve them to the States, lies solely with the people of the several States.

This is the basis of our sovereignty, unchanged by John Marshall, unchanged by the Civil War, not altered in any way since the Constitution was created in 1787. And if the States carelessly have permitted this authority to slip from their hands, by tacit acquiescence in the Supreme Court's encroaching constructions of the Constitution, the r i g h t clearly remains in the States to reassert the sovereignty that is unquestionably theirs.

It is our profound hope that, in time, the doctrine of State interposition will be taken up not only in the South but in other regions also. This is no local condition. If the South happens to be affected most drastically by the court's flagrant encroachment of May, 1954, the next usurpation may affect the Pacific Northwest, or New England, with equally brutal force. The Fabian effort to convert our Republic from a Federal Union of States into one consolidated, national government will not be halted until all of the States awaken to the judicial encroachments that have made such progress in the past 20 years.

Now, it may be the will of the people to abandon the compact our fathers created. The people can, if they choose, accept the proposals for a centralized government that Hamilton advanced, only to see them flatly rejected, during the early weeks of the Convention of 1787. Sovereignty can be transferred from the people of the States to the people of the nation, and we can arrange for Constitutional amendment in the future by national referendum and a simple majority of all the voters. Congress can be abolished as such, and a single parliament can be created in which representation is based upon population alone. All this can be accomplished.

But if the structure of our Union is to be so radically changed, it must be done by Constitutional process. Until the people do embrace the Hamiltonian concept of an all-powerful national government, in which State powers and State citizenship are extinguished, we remain a *union of States.* And in this Union, each State stands equally with every other State as a member of the Compact, equally entitled to judge for itself if the Compact be violated.

The alternative to interposition, as we see it, is a continuing surrender to judicial legislation, a continuing spineless submission to the usurpation of reserved powers.

The people of Virginia—the people of every State—are not compelled to lie down like sheep and be sheared by any court. What was it our own General Assembly resolved in 1798 and again in 1829? It was that the States, facing a deliberate, palpable and dangerous encroachment by the Federal Government, not only have the right, *"but are in duty bound"* to interpose against the evil. This old call to duty, echoing from a great generation, should not pass unheeded today.

not sleep!!!

On January 9, 1956, Virginians voted two to one in favor of calling a State Constitutional Convention which could authorize a program of "tuition grants" to children placed under court orders for compulsory integration. The News Leader had vigorously supported the referendum. Now, with the General Assembly in regular session, it returned to the campaign for interposition. One editorial in this period is the following, from the page of January 16. This editorial was accompanied by an excerpt from John Taylor's New Views of the Constitution.

The Nature of Sovereignty

In a statement to the press last week, Delegate Robert Whitehead announced himself squarely against the doctrine of interposition. The proposal, he said, is "a fantasy." In this opinion he is joined by segments of the press who have chosen to ridicule that which they lack the willingness to study, it ever being the inclination of some editorialists to write first and think later, if at all. But Mr. Whitehead, it may be assumed, speaks from some reflection; we would respond to him in a spirit of rational debate.

Interposition, he avows, is a fantasy; it is "nullification nonsense." Now, the doctrine of interposition rests upon the doctrine of State sovereignty. If this sovereignty is a fantasy, then interposition must truly be a fantasy also, even as Mr. Whitehead asserts; but if State sovereignty is valid, then at least a possibility is raised that interposition is a valid manifestation thereof. We should look, then, at the basis of State sovereignty, and here first at the Declaration of Independence. Let us inquire who it was that made this declaration, and what it was that they highly resolved.

We will find, astonishingly enough (for the Declaration is too little read), that this was no declaration by an "American people." Those who made the Declaration, it will be seen, were "We, the representatives of the United *States* of America," speaking under the "authority of the good people *of these Colonies.*" And what, precisely, did they resolve? It was, "that these United Colonies are, and of right ought to be,"—what? A free and independent *people?* A free and independent *nation?* By no means. This basic document declared the colonies henceforth "free and independent *States,*" and the plural is repeated with great deliberation twice in the next breath: "That as Free and Independent *States,* they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other acts and things which Independent *States* may of right do."

This was our beginning as independent, separate States. Out of this beginning came in 1778 the Articles of Confederation, ratified by the States, as States. On this basis the war was fought and won—by a confederacy of States, each sovereign, each joined equally with the others in a union for limited purposes. And out of this there came, in May, 1787, the convention at Philadelphia. There can be no question, we would respectfully submit, that at least to this point the sovereignty of the individual States is clearly disclosed.

Sovereignty Retained In Drafting Constitution

Was State sovereignty abandoned, then, in formation of the Constitution? Those who contend against the sovereignty of States had best search diligently for supporting evidence here, or else beat a retreat to the barren ground of amendments since 1787. Can such supporting evidence be found? On the contrary, the Constitution reflects from top to bottom, *today as it did then,* that the States are in fact sovereign. Theirs was the power then to reject the proposed union if they wished; theirs is the power today to dissolve it at their pleasure.

What is the essence of sovereignty? John Taylor of Caroline, the brilliant Virginian whose views of the Constitution appear in part on this page today, defined it most briefly: "A will to enact, and a power to execute." The States, as States, had the will to form a limited Union; the States, as States, alone had the power to execute that will. The very name they gave their union made their purpose clear: They employed precisely the terminology employed in the Declaration of Independence, precisely the
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employed in the Declaration of Independence, precisely the terminology employed in the articles of confederation: They ordained and established a Constitution for "the United *States* of America." This appellation, relied upon in our three basic documents, spells out a league among sovereign States; it does not imply a consolidated nation in which sovereignty has been transferred to the mass of people and snatched from the people of the States. There are many States, as Taylor reminds us, "but no State of America nor any people of an American State."

Thus the Constitution was ordained and established, to be binding only *between the States so ratifying the same.*" Not until New Hampshire became the ninth State to ratify was there a compact formed, and both North Carolina and Rhode Island, as sovereign, independent States, took their own deliberate time in joining the league.

Powers Were Delegated, State Sovereignty Reserved

What sort of government did the ratifying States assent to? Was it a sweeping, all-powerful national government in which their State powers were obliterated? By no means. *Some of their powers they delegated, all of their sovereignty they reserved.* There is a most significant distinction to be drawn. The States created a nation, and imbued it with certain powers characteristic of sovereignty, but they were no drone bees who died themselves in the progenerative process.

What did they assure themselves as to the House of Representatives? It was that "each State shall have at least one Representative." What did they provide as to the Senate? It was that it "shall be composed of two Senators from each State," and that "no State, without its consent, shall be deprived of equal suffrage in the Senate." How did they arrange for election of a President? It was that "each State shall appoint . . . a number of electors." What was said of State militias? The first article reserved "to the States respectively the appointment of the officers, and the authority of training the militia." What of treason? Is was provided that "treason against the United States shall consist only in levying war against *them* . . ."

The evidence is overwhelming. By the most careful explicit enumeration, the sovereign States delegated a part of their power, *and no more.* And after the Constitution was ratified, because conventions in "a number of States expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory *and restrictive* clauses should be added," the States nailed on 10 basic amendments; and the last of them reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Could anything be plainer than this, that it is the States that confer powers upon the Federal government, *and never the Federal government that confers powers upon the States?* Is it not beyond cavil that the Federal government cannot itself deny powers to a State, but that only the States themselves, pursuant to Constitutional process, can prohibit a power to themselves?

The sovereignty so jealously preserved 165 years ago exists today as surely as it existed then. Is not citizenship an attribute of sovereignty? And are we not citizens of Virginia, no less than we are citizens of the United States? Is not control of territory a manifest attribute of sovereignty? Is it not explicit in the Constitution that no State can be carved up without the consent of its Legislature? As rapidly as questions tumble from the Constitution, just as rapidly the answers fly back: It is not the "American people" who are supreme, but the people of the respective States as such; and it is the States as individual entities that stand as equal members of this compact, each absolutely entitled to exercise sovereign powers in its own jurisdiction except where such powers have been specifically "delegated to the United States by the Constitution," or "prohibited by it to the States."

Basic Structure Never Abandoned

Search the subsequent amendments as you will, nothing can be adduced to show that this basic structure of sovereignty ever has been abandoned. The Reconstruction Amendments did not touch these things. The power to amend remains in 1956 where the convention placed it in 1787, in the hands of not fewer than three-fourths of the several States. If all of this be fantasy, than the Constitution itself is a fantasy, a scrap of paper, a thing of gauze and tissue. And if it be contended that the Founding Fathers, after going to such painstaking care to preserve their sovereignty, inad-

Continued

vertently gave it away, after all, to a majority of one man on a Supreme Court, then it may be inquired who is talking fantasy and who is talking sense?

It is to this proposition of plain common sense that the doctrine of interposition is addressed. Surely it cannot be imagined that if three-fourths of the States solemnly agree upon an amendment, declaring that A is A, a few judges appointed for life can the next day (or 80 years later) declare that A is, rather, B —and that the States are helpless to suspend this flagrant infraction of their clear understanding. If that is the case, then the Constitution is no longer the supreme law of the land, as it says; the Supreme Court has become the supreme law of the land, and we have abandoned the whole structure of our union for government by judicial legislation.

How, then, when the evil of usurpation appears, is the progress of the evil to be arrested? Can it be contended, Taylor asks, that our Federal system contains no principle of self-preservation? If the courts are not bound to obey a Congressional act they regard as unconstitutional, are the sovereign States more bound to obey a judicial decree they regard as unconstitutional? Do the critics of interposition contend that unconstitutional *laws* are void, and unconstitutional *judgments* binding? On what basis do they argue that Congressmen are human but justices divine?

Careful reflection will suggest, rather, that in a union so precisely erected upon checks and balances, some check must exist against judicial usurpation — and that check can be found only in the power of the States to interpose against the court, to charge infractions of their compact, and to demand that all the States pass judgment on the charge. This is interposition, and if its exercise may lead to temporary uncertainties in constructions of the Constitution, is this not better than despotism?

"If the State and Federal governments may occasionally be scratched by the mutual check resulting from the division of powers," observed John Taylor of Caroline, "it may still be considered as only the brier which bears the rose called liberty, able to impart that rare flavour to our political nosegay, highly agreeable to some people, but very offensive to others."

The Exposition of John Taylor of Caroline

JOHN TAYLOR OF CAROLINE (1753-1824), lawyer, farmer, statesman, philosopher, agricultural scientist, ranks among the most profound political thinkers in American history. A Revolutionary War veteran and early Jeffersonian democrat, the Virginia savant never veered from his conviction that the American Union was dependent upon a strict construction of the primacy of individual and State rights under the Constitution.

His "Arator" both championed the cause of the farmer in the American economy and advanced a radically new and sound program for soil conservation. His "New Views of the Constitution," and his "Constructions Construed and Constitutions Vindicated" are among the essential documents of American political thought.

The following excerpt from Taylor's Views is commented upon editorially today.

—EDITOR.

JOHN TAYLOR OF CAROLINE

The Constitution creates Federal legislative, executive and judicial departments; and such departments also are established by State sovereignties. Are these departments concurrent or exclusive rights, or does their extension to the Federal government create a supremacy in the departments delegated, over the departments reserved?

In either view, we discern the only imaginable distinction between a Federal and a consolidated national government, and behold the identical question which long divided the convention [of 1787]. The abolition of these State departments, or their subordination to a national government, was contended for. Our alternative is yet the same under the con-

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struction of the Constitution subsequently advanced, as it was in the convention. We must either vindicate the concurrency of powers, except where the positive prohibitions intervene, or accept the proposed subordination.

The Federal judicial power is extended to all "cases in law and equity arising under this Constitution, the laws of the United States, and treaties." If the judicial power of the States, in virtue of their sovereignty, extends also to these cases, we have only to enquire, whether the Constitution invests the Federal judicial power with a coercing supremacy over itself, or whether this concurrency establishes a mutual interdependency, as in the case of Federal and State legislative powers.

Towards the solution of the question, we must determine, whether the enumeration of Federal judicial powers, is not a limitation and restriction, like the enumeration of Federal legislative powers. Congress is empowered "to make all laws necessary and proper for carrying into execution the *powers vested* by the Constitution in the government of the United States. The Federal judicial power is extended only "to all cases in law and equity arising under the Constitution."

THE ANALOGY between these expressions is considerable. Neither conveys a power to alter the terms of the compact between the States. Both must therefore have been intended as respectively prohibiting the Federal legislative and judicial departments from effecting this end, either by laws or judgments. Otherwise Congress, by laws, or the Federal courts, by judgments, might alter the Constitution.

The constitutional mode of amendment subverts this construction. It prohibits us from supposing that a concurrent power of amendment, was lodged in Congress, the Supreme Court, and three-fourths of the States. A power in any department of the Federal government to amend, would have defeated the precaution of requiring three-fourths of the States to effect an alteration.

If such a power is not given, how can its exercise be prevented, or does our Federal system contain no principle of self-preservation?

Suppose Congress should alter the Constitution by laws, and the Federal courts should execute them. Can the usurpation be prevented by any other principle, than a concurrent power in the State and Federal governments to construe and preserve the Constitution; or are unconstitutional Federal laws void, and unconstitutional Federal judgments binding? Can any other principle sustain the mode of amending the Constitution, and the mutual check between the Federal and State departments, so highly praised by the *Federalist*? . . .

Thus we are conducted to the restriction contained in the words, "cases in law and equity." Their true meaning must be preserved, or the plain intention of the Constitution destroyed. A power to try cases in law and equity, has never been understood to comprise a power of common legislation, and much less the higher power of altering Constitutions or forms of government. The English judiciary try cases in law and equity, but this does not comprise a power to alter the rights of the English political departments. These are the guardians of their own rights, not to be altered except by a concurrence of all.

The State governments are also the guardians of their own rights, not to be altered except by a concurrence of three-fourths. The Senate of the United States is a precaution for preventing evasions of this concurrence, which would be defeated if the Supreme Court could acquire a power of controlling the State governments, because the Senate cannot revise judgments or decrees in cases of law and equity. . . .

THE CONSTITUTION is susceptible of three distinct characters, which will shed much light on its construction. It ought to be considered as a compact, an organization of a government limited by the compact, and as a law in relation to individuals.

Its essential stipulation as a compact, is the division of power between the State and Federal governments. This feature is impressed upon it in the strongest lines, by the guarantee of a republican form of government to every State, and the reservation of undelegated powers.

Can a government be called republican, or even be any government, if its powers may be taken away by another government, or if it is responsible, not to the people, but to a few judges, who are themselves responsible to another government?

The argument used in the convention, now again advanced [1823], that the States are subordinate corporations, is refuted by the Constitution itself in its guarantee and reservation. Who are the guardians of the compact, the guarantee, and the reservation? The people of each State, or the Supreme Federal Court? Is this court a State, a republican form of government for every State, and the receptacle of the reservation? . . .

Suppose the guarantee to convey a power, instead of imposing a duty, the State forms of government fall under the jurisdiction of the United States, and cannot be regulated by a jurisdiction to try suits in law and equity. If the guarantee is only a duty, the State governments, to be republican, must be regulated by the people of each State. How can they be republican, if they may be tried, their laws and judgments annulled, and their powers abridged, by a court, which is neither their peer, their master, nor their guarantee?

To abridge the powers of State governments, is equivalent to the suppression of State Legislatures. The Constitution, in accordance with its character as a compact, composes a jury consisting of three-fourths of the contracting parties, for its own trial, because they were compeers; and neither subjected itself as a compact, nor these compeers and mutual guarantees, to the power of a few men only enabled to try cases in law and equity. . . .

THE LEGAL feature of the Constitution, in relation to judges, is expressed in the sixth article. "The Constitution is the *supreme law* of the land, and the judges in *every State* are to be bound thereby." Can the judgments of the Federal court be a supreme law over the supreme law? Is there no difference between the supremacy of a Federal court over inferior courts, and the supremacy of the Constitution over all courts?

The supremacy of the Constitution is a

guarantee of the independent powers within their respective spheres, allowed by the *Federalist* to the State and Federal governments. A supremacy in the court might abridge or alter these spheres. The State judges are bound by the Constitution and by an oath to obey the supremacy of the Constitution, and not even required to obey the supremacy of a Federal court.

Why are all the departments of the State and Federal governments equally bound to obey the supremacy of the Constitution? Because the State and Federal governments were considered as checking and balancing departments. Had either been considered as subordinated to a supremacy in the other, it would have been tyrannical to require it by an oath to support the supremacy of the Constitution, and also to break that oath by yielding to the usurped supremacy of the other. The oath requires loyalty to State and Federal powers; judgment might require disloyal to both. . . .

If the State and the Federal legislatures may check each other, so may the State and Federal judiciary. The mutual control of the collateral legislatures, would be rendered abortive, unattended by mutual control of the collateral judiciaries, which must execute the laws of their respective legislatures, or these laws would not operate.

It is admitted on all hands, that judges, State and Federal, ought not to execute an unconstitutional law. This doctrine is founded upon the supremacy of the Constitution over laws, and is the source of a mutual control between all political departments. The axiom declares that the judicial power of a government is coextensive with the legislative. The legislature cannot enforce unconstitutional laws. If judicial power can pronounce and enforce unconstitutional judgments, it would exceed legislative beyond computation. The same supremacy of the Constitution, and the same reasoning which justifies judicial power in its refusal to obey an unconstitutional law, **justifies** also a State judiciary in refusing to obey an unconstitutional Federal judgment . . .

An authority, superior to the authority of Congress, established the supremacy of the Constitution; and therefore, if a law of Congress is unconstitutional, it is void, as being treason against this authority. The same authority reserved the State rights, including those of a judicial nature; and if under its protection, the judicial Federal department is bound to disobey an unconstitutional law of the Federal legislative department, the State departments cannot obey an unconstitutional Federal judgment, without also betraying the Constitution.

If the mutual control is imperfect, and sometimes inconvenient, so are all other precautions for the preservation of liberty. As mankind can only select the best, its imperfection is not a good reason for its abandonment . . .

THE SUPREME COURT was not entrusted with the trial of impeachments, as was proposed in the convention, because its judgments might deprive individuals of a few political rights; but it is contended that it possesses, constructively, a power to try impeachments of whole States, and to deprive them of political rights, infinitely more important . . .

The usual precaution of impeachment was retained by the Federal government to secure fidelity to itself, and not to secure fidelity to State rights. Can we infer from a want of confidence sufficient to entrust the Supreme Court with the trial of Federal officers, a confidence sufficient to entrust it with the enormous political power of trying whole States?

If a power in the court to circumscribe the political rights of individuals, might have nurtured ambitious designs, would not a power to circumscribe State rights be a thousandfold more dangerous? To confound legislative and judicial power in the same body of men, creates a tyranny, which both makes the law and applies the sword; and to enable a single court to cut off State rights by a supreme power of construing the Constitution, would confound the power of creating a Constitution, with the power of construing laws, and render these rights as precarious, as human heads are, under an absolute monarchy . . .

On January 19, 35 members of the Virginia State Senate joined in sponsoring a Resolution of Interposition. Only minor amendments were made in the measure as introduced. It appears hereafter. The following editorial accompanied the text of their resolution.

'The Measure of Redress'

At right appears the text of a Resolution of Interposition that will be introduced in the Senate of Virginia today, under the sponsorship of a majority of the members of that body. We hope that in its present form every advocate of State's rights and every foe of compulsory integration will support the measure.

Several comments may be made on the final text here advanced, but a few general observations on the nature of interposition, as we conceive that doctrine, may well be offered first.

It has seemed to us, the longer we have explored this absorbing subject, that by "interposition" is meant the basic right of a State to assert its sovereignty against Federal encroachments. Assertion of this right may take many forms—mild, moderate, and strong; and the right may be asserted, as we see it, by any of the branches of a State government. Yes-

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terday the Virginia Supreme Court of Appeals, in an admirable action, interposed against the Supreme Court of the United States in a miscegenation case. Governors, in times past, have asserted their executive powers against Federal bureaus. Several years ago, Indiana exercised its powers of interposition in the matter of welfare grants, by insisting upon her right, as a sovereign State, to open welfare rolls for public inspection if she wished.

Interposition should not be confused with nullification; the former is the genus, the latter a species thereof. Nullification is an act of interposition, but interposition is by no means confined to nullification. All blows are not knockout blows, all motor vehicles are not 30-ton trucks; all aircraft are not jet bombers. Similarly, assertions of the right to interpose may range from temperate protest at the one extreme to flat nullification at the other.

The resolution at right falls midway between the extremes. It reflects the spirit of the Virginia Resolution of 1798, in which our Legislature announced that it "doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the 'Alien and Sedition Acts.' " Madison himself, construing the Resolution of 1798 in his report the following year, emphasized that the action was intended only as a protest, "to excite reflection."

But Madison went on to point out that "farther measures"—something more than a protest—could have been taken if necessary, and the resolution offered in Virginia today does, in fact, go a bowshot beyond mere protest.

This resolution would declare, unequivocally, that Virginia has *never* surrendered her right to operate racially separate public schools; it would charge the Supreme Court with unconstitutional encroachment upon the State's exclusive power to amend the Constitution; it would pledge the Assembly's "firm intention" to resist this encroachment by all honorable and constitutional means.

This language, to be sure, stops short of a measure with the bared "teeth in it" that might have been offered. It is not so strong as the resolution Alabama is now pursuing, but it is stronger than the resolution adopted by North Carolina last year. Thus it embodies Jefferson's concept that each State "has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

The "mode and measure of redress" here suggested represents an effort by the sponsoring legislators to accomplish two aims.

The first is an appeal to all the States in this Union to awaken to encroachments by the Federal government upon their sovereign powers. Virginia would ask them especially to join in settling a question of contested power involving a State's right to operate separate public institutions.

The second aim is to do what the Assembly can—and *no one knows exactly what Virginia can do*—to prevent enforced integration of our schools until the constitutional question of the court's decree is put at rest.

Now, some earlier drarts of the resolution were stronger than the final version which appears on this page today; and because the court's action in the school cases seems to us so powerful a usurpation of authority, we might have preferred a more powerful assertion of Virginia's rights. But we are persuaded by such first-rate Senators as Culpeper's Robert Button and Brunswick's Albertis Harrison that a moderate declaration will satisfactorily serve the aims in view. Their feeling is that the suggested resolution (1) will have a greater chance of eliciting sympathetic support outside the South, and (2) will leave the Virginia Assembly in a more flexible position to proceed with a legislative program if we are driven by sheer force to swallow Federal decrees so grievously objectionable to us.

Let us conclude with a comment from John C. Calhoun that seems worth repeating: In 1831, discussing the general doctrine of interposition, he emphasized that its most solemn exercise should be limited to those cases of "dangerous infraction" of the Constitution when, "if the right to interpose did not exist, the alternative would be submission and oppression on one hand, or resistance by force on the other." And he continued:

"That our system should afford, in such extreme cases, an intermediate point between these dire alternatives, *by which the government may be brought to a pause,* and thereby an interval obtained to compromise differences, or, if impracticable, be compelled to submit the question to a constitutional adjustment, *through an appeal to the States themselves,* is an evidence of its high wisdom: An element not, as is supposed by some, of weakness, but of strength; not of anarchy and revolution, but of peace and safety."

A flurry of objections and criticisms greeted the Senators' Resolution. On January 23, the following editorial urged a resolute stand.

Time to Fight It Out

It was a disheartening experience, over the week end, to hear a small chorus of querulous little voices piping on Richmond's Capitol Hill. These were voices complaining that, oh, the Supreme Court's decision in the school cases was dead wrong, but what would Chief Justice Warren say about "interposition"? What effect would the resolution have on somebody's doctrine of judicial review? What of the case of *Tremble-chin vs. Knock-knee?* They didn't know about resisting the court. . . . They would "wait and see."

We would say to these gentlemen, as forthrightly as we know how, that the hour has come to stand up and be counted.

The resolution of interposition now pending in the State Senate has been stripped of those clauses that would have declared the court's decrees in the school cases "null, void and of no effect." A provision has been eliminated that would have asserted the Assembly's view that Section 140 of Virginia's Constitution, requiring the separation of races in public schools, remains "in full force and effect."

In its present form, the resolution stands as a rebuke to the court, as an assertion of fundamental principles, as an appeal to sister States to settle by constitutional process a crisis precipitated by the court, and as a firm resolve to resist "by honorable, legal and constitutional means" the court's encroachment upon our reserved powers. We believe the resolution still is wholly in the spirit of Virginia's interposition of 1798; and we believe it stops well short of the "nullification" that seems to frighten some critics so severely.

Let us fight it out right here.

There was a time when Virginia could recognize the face of tyranny. We had strong men in this Commonwealth then, fearless men, men who loved liberty, men who would resist usurpation. What has become of this spirit? How has our heritage been so wasted?

Virginia has an opportunity now to stand valiantly before the nation, protesting a palpable abuse of the Constitution. Are we to fritter away this opportunity in lick-spittle fawning upon the Supreme Court? Are we to trip and stumble over petty legalities, and squander the main chance?

God, give us men!

We resist now, or we resist never. We surrender to the court effective control over our reserved powers, or we make a fight to preserve these powers. We lie down, piteous and pusillanimous, or we make a stand. We rely upon what great men have termed a State's "right to interpose," or we confess there is no right in a sovereign people effectively to protect their most vital institutions.

This is the showdown, gentlemen. We face the transcendent issue directly: Do we remain a union of States, or do we abandon this basic structure of our country and become docile subjects of Chief Justice Warren? Do we stand by the Constitution, or do we submit to judicial usurpation?

Debate and discussion were heard everywhere in the State Capital. On January 25 this editorial appeared.

Echoes of 1798

It is keenly interesting to reflect, as discussion continues of the doctrine of interposition, how the history of 1798 is repeating itself in 1956.

Even the names are the same: One hundred fifty-eight years ago, the roll call on interposition found Messrs. Godwin, Cooke, Pollard, Gregory, Perrow, Carter, Hudgins, Pope, Newton, Bailey, Daniel, and Allen among those pondering the grave problem of keeping State and Federal governments in their respective spheres. Today's roll of the House and Senate finds their descendants still wrestling with the same issue.

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More than this, precisely the same debate over "nullification," as distinguished from "interposition," took place in 1798. The resolution originally offered by John Taylor of Caroline declared the Alien and Sedition Acts not only unconstitutional, but "not law, (and) utterly null, void, and of no force and effect." Prior to adoption of the resolution, Mr. Taylor consented to an amendment striking the quoted phrase. The same sequence of events has occurred in 1956.

In 1798, just as in 1956, some members of the Assembly argued that actions of the Federal government must be regarded as supremely binding law. Others contended, successfully (and we believe soundly), that "the States have the right, and ought to exercise it, to declare that those proceedings which are an infringement upon the Constitution are not binding."

James Barbour, a young Delegate from Orange County, had this to say: "He believed he should not use language too strong, was he to assert, that in the proceedings of this Legislature might be read the destinies of America; for issue was joined between monarchical principles on the one hand, and republican on the other; and they were the grand inquest who were to determine the controversy. For should so important a State as Virginia sanction the measures complained of in the resolutions, (which she would do if the resolutions should be rejected,) it would become a step-stone to farther usurpation, until those great rights, which are guaranteed by nature and the Constitution, will be destroyed one by one. . . . The State Legislatures being the immediate representatives of the people, and consequently the immediate guardians of their rights, should sound the tocsin of alarm at the approach of danger, and should be the arm of the people to repel every invasion."

The high place Mr. Barbour accorded the State Legislatures most certainly should be reasserted today.

But sad to relate, many members of today's Assembly do not seem fully to realize how important they are in the structure of American government. Years of tacit acquiescence to the growing domination of the Federal government have left them with an inferiority complex difficult to shake off. They have forgotten that in their hands reposes the ultimate sovereignty of this Union: The State Legislatures, and the State Legislatures *alone*, have the power to amend the compact. The United States Constitution is peculiarly *their* Constitution; it is the State Legislatures that are the final guardians of its provisions.

There should be not the slightest hesitation on the part of the Virginia Assembly in declaring the Supreme Court's action in the school cases "illegal" and "unconstitutional" if that is how members regard it. Nor should we worry too much about the precise legal effects of such a declaration, whether a resolution "binds" or does not bind. That will have to remain, as so many things in this venture must remain, for the future to disclose.

The famed Resolution of 1798, in Madison's view, was primarily a "protest." That certainly is one function sought to be served by a Resolution of Interposition today. In the case of the Alien and Sedition Acts, the protest of 1798 served its purpose: As Governor John Floyd termed it, in the address at right, it was a "triumph of the conservative principle." The wave of prosecutions subsided after the action taken by Virginia and Kentucky, and the offensive laws were permitted to expire without effort to renew them.

In our own view, a simple protest, while useful, will not wholly suffice today. Virginia has the right, we believe, to pronounce the court's decision an illegal encroachment upon the reserved powers of the States—*for whatever effect such a pronouncement may have.* And we ought also to declare, as plainly as possible, our firm intention to resist this encroachment by every honorable, legal, and constitutional measure that may prove available to us. If such solemn declarations are coupled with a respectful appeal to sister States to resolve the controversy, we cannot believe the resolution will be without beneficial effect; surely it will have some moral effect, or persuasive effect, or political effect, regardless of whether is has "legal" effect.

The resolution offered last week by 35 members of the Senate may need some slight polishing as to language, but the substance ought not to be changed or weakened. Its meaning is unclear only to those professional obfuscators whose contributions to the recent referendum are so vividly remembered. For our own part, we would be more disposed to see provisions put back in, than to see anything more taken out.

It is time now to put an end to compromises. It is a time to stand, unashamed, on the fundamental principles embodied in the resolution.

One word in the pending resolution seemed to be causing most objection: Should the Assembly term the court's decision flatly an "illegal" encroachment? This editorial discussed the point on January 27.

Certainly We Think It 'Illegal'

Much of yesterday's discussion of interposition dealt with the word "illegal," as it appears in the fourteenth and final resolve of the pending measure. Here the Assembly would pledge its firm intention

> to take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers . . .

It evidently was the feeling of Senators Breeden and Spong, and of Delegate Robert Whitehead, that the word is susceptible to some misconstruction at the bar. Said Mr. Whitehead: "If the decision is 'illegal' it is unlawful; and if unlawful it is not law; if it's not law, no one's bound by it."

The wonderfully heartening action that developed in the House yesterday, when upwards of 70 members endorsed a resolution containing the phrase just quoted, probably makes extended comment unnecessary. It is evidently the will of the Assembly to adopt the strongest possible measure, short of flat nullification, that can be devised. Needless to say, this will suit us perfectly.

But a few observations may be made on the point that concerns our critics. The resolution now before the Senate was designed to echo the spirit and intention of the Virginia Resolution of 1798. This was Madison's Resolution, offered in the House by the brilliant John Taylor of Caroline. Their measure termed the Alien and Sedition Acts a "most palpable violation" of constitutional rights, and went on to express Virginia's scrupulous fidelity to the Constitution. The resolution continued:

> The General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken by each, for co-operating with this State in maintaining unimpaired the authorities, rights and liberties reserved to the States, respectively, or to the people.

Thus it will be seen that the Assembly did not hesitate in 1798 to declare unequivocally "that the acts aforesaid are unconstitutional." And following Mr. Whitehead's reasoning, it may be said that if an act is unconstitutional, it is void; and if void, it is not law; and if not law, no one's bound by it.

But Madison did not regard the declaration as any legally binding pronouncement. This is what he said on the point in his Report of 1799:

> It has been said that it belongs to the judiciary of the United States, and not the State Legislatures, to declare the meaning of the Federal Constitution.
>
> But a declaration that proceedings of the Federal government are not warranted by the Constitution, is a novelty neither among the citizens, nor among the Legislatures of the States; nor are the citizens or the Legislature of Virginia singular in the example of it.
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> Nor can the declarations of either, whether affirming or denying the constitutionality of measures of the Federal government, or whether made before or after judicial decisions thereon, be deemed, in any point of view, an assumption of the office of the judge. The declarations, in such cases, are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force. The former may lead to a change in the legislative expression of the general will; possibly to a change in the opinion of the judiciary; the latter enforces the general will, whilst that will and that opinion continue unchanged.

This same exposition was advanced by Senator Harry C. Stuart in the letter to Mr. Whitehead which is published in full on this page today. No expression by this Assembly on the Supreme Court's decree can, in itself, undo that decree, render it void, or bind lower Federal courts to ignore it. Until the Constitution is amended or the court reverses itself, the court's decrees are the law, because, in Mr. Madison's phrase, the judiciary can carry them into effect "by force."

But that consideration surely does not gag the General Assembly of Virginia, or prevent it from interposing the sovereignty of this State in an effort to arrest the progress of the evil done to the Constitution by the court. This Assembly may express itself in any way it pleases

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Sen. Stuart

Honorable Robert Whitehead
House of Delegates
State Capitol
Richmond, Virginia

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—the stronger the better!—in the hope (it can be nothing more) that solemn legislative declarations will have a persuasive effect upon the courts and upon public opinion.

It has been complained that this is not only "not nullification" but "not even interposition." Our response is that Madison, Jefferson, Taylor and Calhoun, who certainly were more astute thinkers upon the Constitution than any of us today, many times described Virginia's Resolution of 1798 as "interposition." Governor John Floyd, in the message we republished on Wednesday, described it thus. So did Littleton Waller Tazewell. So did Abel Parker Upshur.

If one wants to get at the meaning of nullification, it may be suggested that South Carolina's ordinance—not resolution, but *ordinance*—of 1832 is the model for proper reference. This was designed "to nullify certain Acts of Congress." It declared the Tariffs of 1828 and 1832 "null, void, and no law, nor binding upon this State, its officers or citizens." It declared that all judicial proceedings affirming the acts "are and shall be utterly null and void." It declared that "from and after the first day of February next [1833], all persons resident or being within the limits of this State . . . are hereby required and enjoined to obey and give effect to this Ordinance." It wound up with a declaration that should the Federal Government employ force to collect its customs, the people of South Carolina

> will thenceforth hold themselves absolved from all further obligation to maintain or preserve their political connexion with the people of the other States, and will forthwith proceed to organize a separate government, and do all other things which sovereign and independent States may of right do.

That, gentle reader, was nullification, vintage of 1832. To suggest that the Stuart Resolution of 1956 in any way adopts that pattern is to suggest an absurdity.

No. The resolution before the Senate is one of interposition solely—yet as such, it remains a strong and hopefully effective declaration. It pledges the Assembly's intention firmly to resist illegal encroachment—the line might well read, "illegal and unconstitutional encroachment"—by whatever honorable, legal and constitutional measures may prove open to us. These would include litigation, legislation, appeals to sisters States for Constitutional amendment, judicial proceedings within our State courts, and every other tactic, in Senator Stuart's phrase, calculated "to impede" enforcement of the court's decrees.

To the best of our ability—*whatever this "best of our ability" may prove to be*—we would seek "to arrest the progress of the evil." That is our aim; that is our purpose; and it is not to be defeated by legalistic lint picking or haggling over the juridical effect of a word here or a word there.

The letter from State Senator Harry C. Stuart chief patron of the Virginia Resolution, to Delegate Robert Whitehead leading opponent, accompanied the editorial of January 27. The letter follows. (See also opinion of J. Lindsay Almond, Attorney General of Virginia, addressed to Delegate Whitehead, page 55)

Sen. Stuart to Delegate Whitehead

January 24, 1956

Honorable Robert Whitehead
House of Delegates
State Capitol
Richmond, Virginia

Dear Robert:

I am in receipt of yours of the twentieth, in which you propound nine legalistic questions relating to the Joint Resolution introduced on the nineteenth by 35 members of the Senate, myself among them. You are of course aware that I am not a lawyer; but I have discussed your questions with certain of my colleagues, who have joined in sponsoring this resolution, and would now respond to them.

First, let me say this of the resolution. I perceive its intention to be this: It warns our people against the encroaching spirit of the Federal government; it argues the unconstitutionality of the Supreme Court's decision in the school cases; it points to other instances in which the constitutional limits have been overleaped; it dwells upon the dangerous usurpation of amendatory powers; and in general presses the necessity of watching over the consolidating tendency of the Federal government. Beyond this, it declares the opinion of this Assembly as to the power reserved to the States to

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maintain certain racially separate public schools, and asserts that Virginia, at least, has never surrendered such power, however, it acknowledges the contrary opinion of the Supreme Court, and suggests that a question of whether the court has violated the Constitution ought not to be decided by the court itself, but should be taken to the one tribunal that Jefferson and Madison regarded as superior to the court's authority—the tribunal of the States themselves. Hence an earnest appeal is made to the sister States to settle the question by clear constitutional process, pursuant to Article V of the Constitution. And until the appeal is settled, it is proposed that the Assembly take whatever proper measures may be honorably, legally, and constitutionally available to us, firmly to resist what we believe is an illegal encroachment upon our powers.

This is a resolution of interposition. The word seems to frighten you. It does not frighten me. It is a good word. It was employed in this context by the author of the Declaration of Independence and by the "father of the Constitution." In the sense in which they used it, and in which it is used in the resolution, I understand it to mean an action taken on behalf of a State by one of its departments, seeking to protect the State and its people from invasion of the reserved power of the State by some department of the Federal government. That right I believe we have. That right the resolution would invoke.

My own reasons, as a layman, for believing that this right exists are derived from my own understanding of the nature of our government and our novel system of "dual sovereignty." As I comprehend this system, the people of the States, acting not as any mass of people, but rather as States, created a Federal government and delegated to it certain enumerated powers. All other attributes of sovereignty they specifically reserved to themselves.

In order to preserve this admirable system, they established certain checks and balances. Some of the "checks" on the executive and legislative branches are specifically contained in the Constitution itself, for example, the veto power of the President, and the Senate's power to confirm certain presidential appointments. In addition, the people themselves, through exercise of their suffrage, retain an immediate and direct check upon these departments.

But the one most familiar "check" upon the executive and legislative branches—the power asserted by the judiciary to declare their acts unconstitutional—is nowhere spelled out specifically in the Constitution. The brilliant mind of John Marshall perceived that such a check existed because it had to exist, as a matter of necessity, in order that our form of government may survive.

Not until comparatively recent years has it appeared vitally necessary for us to reappraise this system of checks and balances, to determine if something is missing. The problem of judicial encroachment seems not to have been fully perceived by the founding fathers. Mr Hamilton, in the *Federalist*, terms the Supreme Court the "weakest" of all departments; he thought the people "could never fear oppression from that quarter."

Now the question is before the country and demands an answer: *What is the check upon the judiciary?* What recourse have we if the Supreme Court commits gross error in a decision on a constitutional question?

Mr. Madison, to whom both of us have a fondness for adverting, suggested "remonstrances," but surely mere remonstrance is a flimsy shield for a free people. He suggested "impeachment," but impeachment lies only for "treason, bribery, or other high crimes and misdemeanors," and it is not to be supposed that even gross error falls within this purview. He did not suggest packing of the court, which was done in the 1860s and again attempted in 1937, but to me, at least, that is a dishonorable remedy. Neither did he suggest an act of Congress to deprive the court of jurisdiction to hear a particular kind of case, though this, too, was done in the 1860s. It evidently was Mr. Madison's view that this would be but a temporary expedient that affords no solutions. Is a check to be found in Congress' power over the purse, in its right to control appropriations for the judiciary? Surely this would be a contemptible remedy, kin to bribery and extortion. Is the missing check to be found, then, in the death of members of the court and the appointment of new members? To ask the question is to answer it.

Mr. Madison did suggest "amendment to the Constitution," and because that approach figures in our resolution, it should be examined carefully. But if amendment be the "check" and if by its action the court has amended the Constitution, and amendment by the States be now required to restore the Constitution to its purity, you will at once recognize that 13 States can defeat that restoration. I, for one, emphatically deny that amendment can be accomplished by a majority of nine judges supported by 13 States. Certainly no word in the Constitution would give support to such a claim.

I know of no other "checks" set forth in the Constitution.

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It has seemed to me, the longer I have thought on this issue, that we must do today precisely what Marshall did long ago: We are compelled to look beyond the Constitution, even as he did, to find the "check" that must exist, as a matter of necessity, in order that our form of government may survive.

I find this power in the States themselves. It was they who ordained the Constitution; they are the parties to the compact; they alone can alter its terms. By entering into this compact, the States did not surrender the right and the power to preserve it from destruction by a court which owes its existence to it.

I turn to your specific questions. The first of these reads:

1. The original Kilpatrick resolution recognizes that "the jurisdiction of the court (Supreme Court) encompassed the issue submitted to it in the school cases decided by it on May 17, 1954." Does your resolution recognize that jurisdiction and the power of the court to render a decision in those cases?

My answer is this: The resolution, in its present form, no longer contains the phrase to which you refer. It is not the intention of the resolution to deny in any respect the jurisdiction of the Supreme Court to hear any case in which a constitutional right is claimed, and one was claimed in the school cases. But I would make two points: The first is that I do not believe the court's authority to try cases in law and equity arising under the Constitution vests the court with any right in effect to amend the Constitution. I do not believe that five judges equal 36 States. Secondly, I would draw a clear distinction between "right" and "power." The court had the power; the resolution emphatically denies that it had the right to exercise this power in such a way as to stultify the Constitution.

Your second question reads:

2. Is that decision now the law of the land, and is it now law in Virginia? If not, why?

My answer is: The Constitution is the supreme law of the land and supreme in Virginia. For the moment its provisions, as they were understood for 80 years, have been supplanted by an act of judicial legislation which has brought about a situation, binding by force of Federal power, but not binding in right. Because this resolution cannot by itself restore the situation as it existed prior to the decision, and we must take other steps to protect our people, we will shortly amend our State Constitution and, I doubt not, adopt protective legislation of the sort recommended by the Gray Commission. I would emphasize that our resolution is in no sense intended as a substitute for such protective legislation.

Your third question is:

3. If your resolution is adopted, will the said decision be the law of the land, and will it be binding on the Federal courts in Virginia?

The answer to the preceding question answers this also. This resolution cannot "bind" Federal courts. We would hope, however, that it would have a highly persuasive effect upon them.

Your fourth question reads:

4. If your resolution is adopted, will it have the effect of legally suspending the enforcement of the decision in Virginia? If so, why, and for what period?

The resolution in itself will not legally suspend the enforcement of the decision in Virginia. However, I hope the resolution will set in motion a chain of actions that will not only impede the enforcement of it in Virginia, but will entirely obliterate the decision in Virginia and elsewhere.

Next you ask:

5. Do you concede or deny that a decision of the Supreme Court of the United States construing the Constitution of the United States is the law of the land and binding in every State in the Union unless and until there is an amendment to the Constitution approved by three-fourths of the States overriding the decision? In this connection, I call your attention to the adoption of the fifteenth amendment overriding the decision in the Chisholm case, and the sixteenth amendment overriding the decision in the income tax case.

First, let me observe that it was not the fifteenth amendment that overturned the Chisholm case, but the eleventh. And, let me observe also that in the interim of more than one year between the court's opinion in the Chisholm case and the ratification of the eleventh amendment, Georgia flatly refused to abide by the court's decision. It seems to me an admirable example.

Secondly, the decisions of the court are binding unless and until there is an amendment, *or* unless and until the court changes its mind. This last contingency has manifested itself 36 times in the past 20 years, a fact that might be called to the attention of those who fear such "disorder" and "chaos" if the States undertake to express their views on constitutional matters.

Subject to this qualification, I agree that the court's opinions are binding. But I submit that in the case of "deliberate, palpable and dangerous" errors by the court, to borrow the language of Jefferson

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and Madison, such erroneous opinions are binding not as a matter of right, because they are palpably wrong; and not binding because they are constitutional, because they are unconstitutional. They are binding as a matter of superior force.

Next you ask:

6. If your resolution is adopted, do you maintain that the decision of the court can be permanently overridden or vetoed by the action of one-fourth of the States? If so, is this not the Calhoun (of South Carolina) doctrine of State veto or nullification?

I maintain this: That under Article V of the Constitution, it is clearly intended that substantive changes should not be made in the Constitution except by the approval of not fewer than three-fourths of the States. This protective clause was placed in the Constitution expressly to assure the rights and interests of a numerical minority of the States from oppression by a numerical majority.

In the case immediately under consideration, the fourteenth amendment was adopted with the explicit and demonstrable understanding that it did not prohibit to the States the power to operate racially separate public schools. This was the fourteenth amendment as three-fourths of the States consented to it. Now the court has undertaken to changed this understanding, and in effect to change the amendment. Again, I believe that the consent of three-fourths of the States should be required.

If it can be shown that three-fourths of the States do *not* consent to this substantive change in their Constitution, I believe that such a showing would be a powerful rebuke to the court. It might not be sufficient permanently to override the decision, for nothing is permanent in this world, and especially the opinions of the Supreme Court seem not to be permanent. But such action might cause the country seriously to consider whether it wishes to let a majority of a nine-man court amend the Constitution, or whether it intends to preserve this amendatory power to the States.

This is not nullification, in the manner of Mr. Calhoun or otherwise.

Your next question reads:

7. In your resolution reference is made to the "issue of contested power" as between the Federal government and the State government. Is not this but a reaffirmation of the basic concept of the Calhoun (or South Carolina) doctrine of State veto or nullification, and a modern recognition of that doctrine?

My answer is No. The recognition of an "issue of contested power" is the recognition that the fact of that issue exists. The experience of the issue, and the recognition thereof does not demand that a particular course of action be pursued.

Your next question is:

8. I assume that you are well aware of the views of James Madison on the subject of State interposition, veto or nullification. In this connection, I refer you to his letter of December, 1831, in which he expressly repudiated the theory that a resolution of interposition would make it possible for one-fourth of the States to abrogate the Federal law. Do you agree or disagree with Mr. Madison?

My answer is this: I believe I am fairly familiar with the views of Mr. Madison on the subject, but I must confess I am puzzled to know precisely what Mr. Madison's views were. You refer me to his letter of December, 1831 (and here I assume you have in mind Mr. Madison's letter to N. P. Trist), in which he repudiated the theory you describe. But you assuredly are aware that this was by no means the only letter in which Mr. Madison expressed these opinions. On the contrary, he appears to have spent most of his time in 1829, 1830, and 1831, in earnest endeavors to explain away the opinions he had expressed so unequivocally in 1800, when he was a good deal closer to the Constitution than he was 30 years later.

But it is difficult for me, at least, to recognize the position Mr. Madison expressed so fervently at this late period in his life, when he was "in the very crippled and feeble state of my health," with that which he expressed with such vigor and positiveness at the time of the Virginia Resolution of 1798. That he gave the most profound thought to his Report of 1799 is not to be doubted; I would submit that this formal, public expression is of more meaning than the personal letters he wrote much later, and it is not amiss to call particular attention to what he said in the Report referred to. Among other things, he said:

> It appears to your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that, where resort can be had to no tribunal, superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The Constitution of the United States was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation.

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The States, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and, consequently, that as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.

Permit me to quote one more paragraph, immediately following the paragraphs just quoted, because certain language from our own proposed resolution of 1956 has been drawn directly from it.

It does not follow, however, that because the States, as sovereign parties to their constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed, either in a hasty manner, or on doubtful and inferior occasions. . . . In the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the patries, in their sovereign capacity, can be called for by occasions only deeply and essentially affecting the vital principles of their political system.

You inquire whether I agree or disagree with Mr. Madison in the matter of interposition. Alluding to the sentence just quoted, I would reply that I most certainly agree with the Mr. Madison of 1799, in believing that the court's decision of May 17, 1954, is of a character so "deeply and essentially affecting the vital principles of (our) political system" as to justify Virginia in the most strenuous measures of interposition we can put forth.

Finally, you inquire:

9. Would the adoption of your resolution challenge and impair the settled doctrine of judicial review by the Federal courts of State law?

I recognize the jurisdiction of the Supreme Court where a provision of the Federal Constitution is involved. But I repeat what was said in responding to your first question: The resolution does not deny that jurisdiction. Hence it does not challenge the authority of the court to hear and decide a case in which it is alleged that a State law violates the United States Constitution.

In closing, let me revert to the fundamental issue here at stake, far transcending the immediate problem of school segregation. It seems to me that if the Supreme Court may fasten upon us entirely what it will, our Constitution is but a "scrap of paper," and ours is no longer a government of laws, but a government by five out of nine men who are entrenched in impregnable position. The Constitution is no longer the supreme law of the land; the court's unchecked discretion is the supreme law of the land. We are no longer the masters and government no longer our servant; the positions are reversed, and the bulwark of our liberties has crumbled. The powers of the States, so carefully reserved in the tenth amendment, in this view were reserved merely until such time as a majority of the court might choose to snatch them from us.

I cannot believe this is the true meaning of the Constitution.

The remedy of interposition here proposed is, admittedly, a drastic and unfamiliar one. But the circumstances are drastic and unfamiliar also. I could not predict with certainty what success, if any, the action may have. If we were sure of success, the amendment of the Virginia Constitution shortly to be adopted, and the revision of our statutes to protect us against some of the evils of the recent school decision, would be unnecessary. But that we may not succeed is no reason why open, dignified and manly effort should not be made.

If it is your feeling that the powers of the States should be extinguished by judicial decree, it is of course your privilege to hold that view; and if you feel that gross and palpable abuse of the Constitution should be docilely accepted by our people, you are wholly at liberty to advance that counsel to Virginia. But I do not believe the people will follow you in it. Rather, I cherish the great hope that Virginians, once again looking upon the face of tyranny, will once again stand squarely in opposition to it. There are, thank God, free men left who will not surrender their convictions and principles, their rights and their liberties, before the hollow idol of judicial supremacy.

This response has been longer than I had intended it to be, but that is ever the misfortune of one who may be put to the answering of complex questions, as distinguished from the easy advantage of one whose only function is the propounding of them.

Recalling that you inadvertently released your letter of January 20th to the press before I had so much as seen a copy of it, I would emphasize that I have taken particular pains to deliver the original of this response into your hands before exercising, myself, the liberty of making it public.

Most faithfully yours,

HARRY C. STUART.

On February 1, after prolonged debate, Virginia's General Assembly approved the Resolution of Interposition—the Senate by a vote of 36-2, the House of Delegates by 90-5. The following editorial of February 2 discussed the debate, and looked to the future.

Interposition: Yesterday and Today

Several points that were made in yesterday's debate on interposition merit comment today, somewhat in the nature of a postscript on an historic entry in the annals of Virginia history.

Let us begin with objections made by Senator Ted Dalton; first, that the issue of interposition has been "magnified out of all proportion," and secondly, that the Virginia Resolution is a "bad example to set before the children of Virginia."

The best response to both objections is to inquire into the fundamental issue with which the Resolution is concerned. It is not, as some of the Northern press pretends, a matter of race or segregation; it is not even a matter of schools. What concerns us here is the preservation of the constitutional structure of our Union. The transcendent issue is the encroachment of the Federal government, through judicial legislation, upon the reserved powers of all the States.

It is difficult to see how this fundamental issue could be "magnified out of all proportion." The fault is not that we have talked of this too much, but that we have written of this too little; not that we awakened so suddenly, but that we slept too long.

The whole concept of this Union, the greatest feature of its architecture, was the concept of dual sovereignty: In certain areas, the Federal government would be supreme; in all other areas, the respective States would be supreme. Joined together, the States would yet remain separate; and remaining separate, they yet would be joined together. This was the great vision of 1787; this was the grand plan on which the whole structure of the Constitution was erected.

In seeking to protect and preserve this structure, is Virginia engaged in anarchy or sedition? Are we, as Senator Dalton suggested, setting a "bad example" of disobedience to law? On the contrary, Virginia is undertaking here to set the highest possible example of fidelity to the compact; it is we who are undertaking to abide by the agreement that others would destroy.

Our hope is that school children will be prompted by the Assembly's action to think upon these things, and to turn their prodigious energies into sober questioning of their teachers. They will find no story more absorbing in our history than the story of the last 25 years of the eighteenth century, when the colonies became "free and independent States," and then joined in ratifying a limited compact, called the Constitution, by which they and their posterity were to be governed.

Some response also may be ventured to Senator Armistead Boothe's objection to the idea that a single State, acting alone, may charge an infraction of the Constitution. He sketched what seemed to him a terrible picture of the chaos that would ensue should Texas insist that the power to fix prices on natural gas at the wellhead is not a power delegated to the Federal government, and Virginia should insist that the power to operate racially separate schools is a power reserved to the States.

But we are not terrified by this prospect. Indeed, this seems to us a far more attractive prospect than to continue under the chaotic conditions of government by an unchecked judicial oligarchy — by a court that has dizzily reversed itself 36 times in 20 years. Delegate Griffith Purcell put his finger on the constitutional answer to Mr. Boothe's objection when he emphasized, during the House debate, that under the Tenth Amendment residual powers are reserved to the States *respectively*—not to the States jointly, but to each respective State in its separate, individual sovereign capacity.

It is this feature of our Union of States that is so often overlooked, and needs so urgently to be better understood. Senator Harry F. Byrd, Jr., made the point clearly in his quiet rebuke to Dr. Edward E. Haddock yesterday. Richmond's freshman Senator, in his astonishing maiden speech, had pointed to the flag of the United States by the president's desk and gratuitously had read the pledge of allegiance. Senator Byrd noted that another flag—the flag of Virgini
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Senator Byrd noted that another flag—the flag of Virginia—occupies an equal position on the president's rostrum. Under the Constitution every American is a citizen not only of the United States, but also a citizen of the State in which he resides. And if it were "not for that flag and 47 others," said Mr. Byrd, "this country would not have reached its level of greatness."

The resounding votes in both House and Senate yesterday indicated Virginia's deep concern that this constitutional division of powers be restored to its old purity and strength. If by Virginia's protest and challenge, other States can be prompted to ponder the nature of our Union, the hours of work that preceded the debate will have served a most useful purpose.

Now the practical question arises: What precisely was accomplished, in a legal sense, by yesterday's Resolution? Where do we go today? Only time can answer these inquiries. In the strictest, most narrow legal sense, probably very little was accomplished; in a legal sense, our action was persuasive, declaratory, expressive of policy and opinion—nothing more. As for the future, it can be said at the moment only that Virginia has made her appeal; we must wait for our sister States to respond.

And if they never respond? Well, then, at least the appeal will have been made—earnestly and respectfully made—and we simply will have to continue along the course of measures "honorably, legally and constitutionally available to us."

The Southern States now joining in this effort to assert their constitutional powers are voyaging on an unmarked channel. The advocates of massive centralization, the doctrinaire Socialists who have seized positions of great influence, have done everything in their power to block the way. But it is a venture worth taking, wherever it leads us. Hopefully, prayerfully, it may bring us back to the principles of sound constitutional government and dual sovereignty, established by our fathers and abandoned in our own time.

Hollow Hope for other states to follow suit.

Commonwealth of Virginia

General Assembly

SENATE JOINT RESOLUTION NO. 3

Interposing the sovereignty of Virginia against encroachment upon the reserved powers of this State, and appealing to sister states to resolve a question of contested power.

Be it resolved by the Senate of Virginia, the House of Delegates concurring,

That the General Assembly of Virginia expresses its firm resolution to maintain and to defend the Constitution of the United States, and the Constitution of this State, against every attempt, whether foreign or domestic, to undermine the dual structure of this Union, and to destroy those fundamental principles embodied in our basic law, by which the delegated powers of the Federal government and the reserved powers of the respective States have long been protected and assured;

That this Assembly explicitly declares that the powers of the Federal Government result solely from the compact to which the States are parties, and that the powers of the Federal Government, in all its branches and agencies, are limited by the terms of the instrument creating the compact, and by the plain sense and intention of its provisions;

That the terms of this basic compact, and its plain sense and intention, apparent upon the face of the instrument, are that the ratifying States, parties thereto, have agreed voluntarily to delegate certain of their sovereign powers, but only those sovereign powers specifically enumerated, to a Federal Government thus constituted; and that all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;

That this basic compact may be validly amended in one way, and in one way only, and that is by ratification of a proposed amendment by the legislatures of not fewer than three-fourths of the States, pursuant to Article V of the Constitution, and that the judicial power extended to the Supreme Court of the United States to "all cases in law and equity arising under this Constitution" vested no authority in the court in effect to amend the Constitution;

That by its decision of May 17, 1954, in the school cases, the Supreme Court of the United States placed upon the Constitution an interpretation, having the effect of an amendment thereto, which interpretation Virginia emphatically disapproves;

That the State of Virginia did not agree, in ratifying the Fourteenth Amendment, nor did other States ratifying the Fourteenth Amendment agree, that the power to operate racially separate schools was to be prohibited to them thereby; and as evidence of such understanding of the terms of the amendment, and its plain sense and intention, the General Assembly of Virginia notes that the very Congress which proposed the Fourteenth Amendment for ratification established separate schools in the District of Columbia; further, the Assembly notes that in many instances, the same State Legislatures that ratified the Fourteenth Amendment also provided for systems of separate public schools; and still further, the Assembly notes that both State and Federal courts, without any exception, recognized and approved this clear understanding over a long period of years and held repeatedly that the power to operate such schools was, indeed, a power reserved to the States to exercise "without intervention of the Federal courts under the Federal Constitution"; the Assembly submits that it relied upon this understanding in establishing and developing, at great sacrifice on the part of the citizens of Virginia, a school system that would not have been so established and developed had the understanding been otherwise; and this Assembly submits that this legislative history and long judicial construction entitle it still to believe that the power to operate separate schools, provided only that such schools are substantially equal, is a power reserved to this State until the power be prohibited to the States by clear amendment of the Constitution;

That with the Supreme Court's decision aforesaid and this resolution by the General Assembly of Virginia, a question of contested power has

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arisen: The court asserts, for its part, that the States did, in fact, in 1868, prohibit unto themselves, by means of the Fourteenth Amendment, the power to maintain racially separate public schools, which power certain of the States have exercised daily for more than 80 years; the State of Virginia, for her part, asserts that she has never surrendered such power;

That this declaration upon the part of the Supreme Court of the United States constitutes a deliberate, palpable, and dangerous attempt by the court itself to usurp the amendatory power that lies solely with not fewer than three-fourths of the States;

That the General Assembly of Virginia, mindful of the resolution it adopted on December 21, 1798, and cognizant of similar resolutions adopted on like occasions in other States, both North and South, again asserts this fundamental principle: That whenever the Federal Government attempts the deliberate, palpable, and dangerous exercise of powers not granted it, the States who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for preserving the authorities, rights and liberties appertaining to them;

That failure on the part of this State thus to assert her clearly reserved powers would be construed as tacit consent to the surrender thereof; and that such submissive acquiescence to palpable, deliberate and dangerous encroachment upon one power would in the end lead to the surrender of all powers, and inevitably to the obliteration of the sovereignty of the States, contrary to the sacred compact by which this Union of States was created;

That in times past, Virginia has remained silent—we have remained too long silent!—against interpretations and constructions placed upon the Constitution which seemed to many citizens of Virginia palpable encroachments upon the reserved powers of the States and willful usurpations of powers never delegated to our Federal Government; we have watched with growing concern as the power delegated to the Congress to regulate commerce among the several States has been stretched into a power to control local enterprises remote from interstate commerce; we have witnessed with disquietude the advancing tendency to read into a power to lay taxes for the general welfare a power to confiscate the earnings of our people for purposes unrelated to the general welfare as we conceive it; we have been dismayed at judicial decrees permitting private property to be taken for uses that plainly are not public uses; we are disturbed at the effort now afoot to distort the power to provide for the common defense, by some Fabian alchemy, into a power to build local schoolhouses;

That Virginia, anxiously concerned at this massive expansion of central authority, nevertheless has reserved her right to interpose against the progress of these evils in the hope that time would ameliorate the transgressions; now, however, in a matter so gravely affecting this State's

most vital public institutions, Virginia can remain silent no longer; Recognizing, as this Assembly does, the prospect of incalculable harm to the public schools of this State and the disruption of the education of her children, Virginia is in duty bound to interpose against these most serious consequences, and earnestly to challenge the usurped authority that would inflict them upon her citizens.

THEREFORE, the General Assembly of Virginia, appealing to our Creator as Virginia appealed to Him for Divine Guidance when on June 29, 1776, our people established a Free and Independent State, now appeals to her sister States for that decision which only they are qualified under our mutual compact to make, and respectfully requests them to join her in taking appropriate steps, pursuant to Article V of the Constitution, by which an amendment, designed to settle the issue of contested power here asserted, may be proposed to all the States.

And be it finally resolved, that until the question here asserted by the State of Virginia be settled by clear Constitutional amendment, we pledge our firm intention to take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers, and to urge upon our sister States, whose authority over their own most cherished powers may next be imperiled, their prompt and deliberate efforts to check this and further encroachment by the Supreme Court, through judicial legislation, upon the reserved powers of the States.

The Governor is requested to transmit a copy of the foregoing resolution to the governing bodies of every county, city and town in this State; to the executive authority of each of the other States; to the clerk of the Senate and House of Representatives of the United States; to Virginia's representatives and Senators in the Congress, and to the President and the Supreme Court of the United States for their information.

February 1, 1956
Agreed to by the House of Delegates
E. GRIFFITH DODSON
Clerk House of Delegates

February 1, 1956
Agreed to by the Senate
E. R. COMBS
Clerk of the Senate

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A TRUE COPY, TESTE:

E. GRIFFITH DODSON
Keeper of the Rolls of the State.

Opinion of Atto

February 14, 1956.
Honorable Robert Whitehead,
House of Delegates,
State Capitol,
Richmond, Virginia.
My Dear Mr. Whitehead:

This is in response to your letter of February 6 requesting my opinion on the scope, effect and legal efficacy of Senate Joint Resolution No. 3, adopted February 1 by both Houses of the General Assembly of Virginia.

You also request my opinion on the status of section 140 of the Virginia Constitution, which provides that "White and colored children shall not be taught in the same school."

The seven questions propounded by you will be treated in the order stated. They are as follows:

"1. Until there is settled the 'issue of contested power' referred to in the resolution, is the decision of the Supreme Court of the United States in the Prince Edward County School case the law in Virginia?"

Under our constitutionally ordained system of government, forming as it does an "indissoluble union of indestructible states," I draw and adhere to a basic and fundamental distinction between that which issues from and under the authority of the Constitution and that which is created through usurped power under the pretended color of but ultra vires of the Constitution. That authorized by the Constitution is de jure law and binding. That not authorized is de facto law and binding only through the sheer force of power. As to the latter, this is true solely because there is no method or procedure known to our system of government whereby an appeal can be taken by the parties aggrieved which would stay the binding effect or hold the decision in abeyance pending determination of the issues raised.

Law, whether statutory or decisional, as conceived and instituted under our Federal system of conferred and limited powers must emanate from, find lodgment in, and be supported by a basic constitutional source. The Federal government is a creature of the creating States, endowed with no powers beyond those voluntarily conferred by compact

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February 1, 1956
Agreed to by the Senate
E. R. COMBS
Clerk of the Senate

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Opinion of Attorney General on Va. Resolution

February 14, 1956.
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House of Delegates,
State Capitol,
Richmond, Virginia.
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J. Lindsay Almond, Attorney-General of Virginia

mutual between its creators. It cannot create additional powers save through violation of the organic law.

The decision to which you refer is devoid of constitutional derivation or support. As hereinabove pointed out, it is presently binding by virtue of superior force shuckled upon a sovereign State through usurpation of authority and arrogation of power transcending the Constitution of the United States, and in abnegation of every apposite legal precedent known to American Jurisprudence. It violates the amendatory processes of the Constitution prescribed by Article V thereof in that it, in effect, amends the XIV Amendment and, pro tanto, repeals the Xth.

The elected legislative representatives of a sovereign people have raised an "issue of contested power" arising as the result of "a deliberate, palpable and dangerous" usurpation of the amendatory power explicitly embodied in the Constitution. Pending determination of the issue in the manner prescribed by the Constitution the sovereignty of the State is interposed to the extent of a pledge of "firm intention to take all appropriate measures honorably, legally and constitutionally available' to resist an encroachment violative of the Constitution and therefore illegal.

The resolution is not one of mullification. Its plan terms negate the concept of nullification. The court embraced that doctrine in its most far-reaching implications when it nullified basic provisions of the Constitution of the United States. The resolution is one of interposition with resort to constitutional processes for relief.

"2. Does this resolution operate to legally suspend, in whole or in part, within Virginia the enforcement of the said decision, and can it be used in the Federal District Court of Virginia in which the Prince Edward case is now pending as a defense?"

The resolution does not purport to operate as a suspension of or supersedeas to the decision as it relates to the defendants in the Federal District Court.

This resolution cannot be asserted as a defense in the pending case. The District Court is bound by the mandate which issued on May 31, 1955. The decision of the Supreme Court and its mandate is the law of the case as far as the District Court is concerned. However, the resolution is an unequivocal epitome of Virginia's unyielding devotion and loyalty to the perpetuation of that constitutional system of government which, more than any other State, she molded and launched in the formation of the Union and the building of an enduring foundation to support the superstructure of the nation. It

is predicated on principles woven ineradicably into the very fabric of the nation's life. It represents the overwhelming solidarity of a great people in their attachment of heart, mind, and conscience to deep rooted convictions which they cannot compromise. It is indisputable evidence of the supreme gravity of the manifold problems created by the Supreme Court far transcending considerations of race.

While this resolution cannot be asserted as a defense, its solemnity, gravity, and patriotism of purpose should give pause and invoke deliberate consideration at the hands of every branch of the Federal government dedicated to a Union indissoluble composed of indestructible states.

"3. What duty, if any, does this resolution impose upon the officials of Virginia and the local officials, especially the local school boards and the division superintendents of schools?"

The maintenance of the public school system is a joint State and local responsibility, both under the Constitution and by statutes. It is the primary responsibility and well within the province of the General Assembly to establish policy, consistent with the Constitution, relating to same, and to change that policy when it deems the public interest so requires.

The resolution is not a legislative enactment having the force and effect of law. It is a solemn and deliberate declaration of right, impelled by the sacred obligation of duty, asserting and interposing the sovereignty of the State to arrest illegal encroachments and to preserve "the authorities, rights and liberties" which Virginia has never surrendered, and which she cannot in honor and duty surrender save only in the manner prescribed by the Federal Constitution. Deprivation or loss of these rights can be brought about in no other manner except through usurpation of authority and arrogation of power by the Federal government, or by abject surrender or acquiescence by this State or its cohesive governmental units. The resolution manifests a firm determination to resort to constitutional means, thereby rejecting surrender or acquiescence. Representing the all but unanimous resolve of the elected representatives of the people, it imposes upon all officials, State and local, the duty to observe "all appropriate measures honorably, legally and constitutionally available to resist this illegal encroachment upon the sovereign powers of this State."

"4. Is Section 140 of the Virginia Constitution (prohibiting the teaching together of white and colored children in the public schools of Virginia) still law in Virginia?

On May 31, 1955, the Supreme Court rendered its so-called implementation decision and remanded the cause of the District Court.

The opinion of May 17, 1954, declared "that racial discrimination in public education is unconstitutional." The court further declared that separation of the races as alleged were per se discrimination.

The opinion of May 31 incorporated by reference the opinion of May 17 and declared: "All provisions of Federal, State or local law requiring or permitting such discrimination must yield to this principle."

The order entered by the District Court, in response to the mandate, on July 18, 1955, adjudged, ordered, declared and decreed:

"That insofar as they direct that white and colored persons, solely on account of their race or color, shall not be taught in the same schools, neither said Section 140, Constitution of Virginia of 1902, as amended, nor said Section 22-221, Code of Virginia of 1950, as amended, shall be enforced by the defendants, because the provisions of said sections are in violation of the clauses of the Fourteenth Amendment to the Constitution of the United States forbidding any State to deny to any person within its jurisdiction the equal protection of the laws."

While by force of power Section 140 of the Constitution is declared by the Federal Courts to be unenforceable, yet, without any constitutional provision relating to the subject of mixed schools, there is, of course, no requirement that integrated schools be operated by any political subdivision of the State.

"5. Aside from being a stern protest and a memorial for the adoption of an amendment to the Federal Constitution, what effect in law, if any, does the said resolution have on the legal situation in Virginia presented by said decision?"

The substance of this question is answered under 1 and 2 above.

The implications of this question tend to minimize the purport and gravity of the resolution. I do not subscribe to these implications.

The resolution is far more than a "stern protest and a memorial." It does not seek to accomplish that which is merely desirable. It does not inveigh against an erroneous action. It calls for no redress for any imposition laid under express or implied constitutional sanction. These and kindred situations would comport with the office and function of a resolution of protest (stern or not) and a memorial to the legislative or executive branch of the Federal Government to take corrective action by establishing or changing a policy or by enacting, repealing or amending substantive laws.

The resolution under consideration is a declaration of right invoking and interposing the sovereignty of the State against the exercise of powers seized in defiance of the creating compact; powers never surrendered by the remotest implication but expressly reserved and vitally essential to the separate and independent autonomy of the States. It is an appeal of last resort against a deliberate and palpable encroachment transgressing the Constitution.

"6. Is it within the powers of (a) the General Assembly of Virginia by resolution, or (b) the people of Virginia in convention assembled by ordinance, to legally nullify, in whole or in part, the said decision, or to thereby suspend for any period of time its enforcement in Virginia?"

(a) No. (b) No.

"7. In the report of the Gray Commission there is no reference to 'State interposition' or 'nullification'. Was this doctrine presented to the Commission by your office, or by any other source to your knowledge, as a possible defense to the enforcement of said decision in Virginia or as a possible solution of the problem created by said decision?"

No. As far as my knowledge goes this doctrine was not considered by the commission.

Sincerely yours,
J. LINDSAY ALMOND, JR.
Attorney General.

BIBLIOGRAPHY ON 'INT
Partial List Of

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Constitution Generally:

Standard texts (Story, Minor, Nort under index entries dealing with States, Supreme Court, State citiz

Ambler, Charles Henry, *Thomas Study in Virginia Politics*; Richm

The Federalist, Hamilton, Jay Mad cially Nos. 6, 7, 9, 15, 17 (there is of irony to be experienced in readi 39, 44, 45 (if only to ponder hov Madison could miss), and Nos. 78 dealing especially with the judicia

Kirk, Russell, *Randolph of Roanok* 1951.

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Sincerely yours,
J. LINDSAY ALMOND, JR.
Attorney General.

BIBLIOGRAPHY ON 'INTERPOSITION': *Partial List Offers a Starting Point*

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